IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

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SUPREME COURT, U.S.

DANE LAMAR JENKINS,
Petitioner,

vs.

LOU BREWER, WARDEN,
Respondent.

No. 80-5116

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dane lamar Jenkins, pro se
Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

DANE LAMAR JENKINS,
Petitioner,

vs. No._____

LOU BREWER, WARDEN,
Responant.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Dane Lamar Jenkins, an indigent prisoner, presently confined at Stateville State penitentiary, Will County, Illinois, and a U.S. Citizen, respectfully prays that a Writ of Certiorari issue to review the final judgments of the United States Court of Appeals for the Seventh Circuit entered in this cause on June 20, 1980.

OPINION BELOW

The opinion of the District Court entered by judge Bernard M. Decker, on October 24, 1979, which is setforth in full review in appendix(A) hereto attached. The order of the Court of Appeals for the Seventh Circuit is also attached hereto in appendix (B).

JURISDICTION

The judgment of the Court of Appeals in appendix (B), was entered June 20, 1980. The jurisdiction of this Court is invoked under Title 28, section 1254 (1), United States Code.

QUESTION PRESENTED

I. Whether the District Court errored when granting the Respondant's summary judgment based upon the Petitioner failure to exhaust his Administrative remedies; when such exhaustion attempts would have proven to be futile,as the relief the Petitioner seeked fro m the Administrative Inquiry Board, which amounted to an inadequate remedy.

II. Whether the District Court errored by not granting judgment to the Petitioner; after the Respondant's never denied confiscating Petitioner's legal materials and other valuable items, during the Institutional State of Emergency orded by the Director of Illinois Corrections.

III. Whether the District Court errored by dismissing Petitioner complaint before hearing or ruling on his "Motion for leave to Amend and Supplement his original complaint.

STATUTES

This case involves section 1979, of the Revised Statutes, compiled as 42 U.S.C. 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or cause to be subjected, any Citizen of the United States or any person within the jurisdiction thereof to the deprivation of any Rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 15 (a) of the Federal Rules of Civil Procedure which reads as follows, in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served .... Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

STATEMENT OF THE CASE

1. On February 24, 1979, Gayle Franzen, Director of the Illinois Department of Corrections, declared Stateville penitentiary as a state of emergency. While Lou Brewer, Warden, acting on the Director's directive, proceeded by issuing orders to lock the Institution down, plus, issued instructions to George May, Administrative Assistant to the Warden, to search and confiscate all contraband materials. In order to carry out the search and seizure directive, Stateville prison officials removed residents from their assigned cells to cells located in other houses for seven days. All property belonging to residents were left behind in their original cells.

A directive from Warden Lou Brewer instructed all residents to place all property that were not required to be kept, in shipping boxes to be mailed home to their families, and all other property left on their beds for inspection.

2. On March 17, 1979, Petitioner was separated from his assigned cell and transfered to another cell house for seven days. It was upon his return to his assigned cell that he found legal materials and other property that he should have been allowed to keep missing. An Administrative grievance was filed with the Institutional Inquiry Board. A few days later, a letter from George May, Administrative Assistant to the Warden of Stateville, confirmed that a hearing would be held, and that his office would attempt to locate and return Petitioner's property.

3. A few days after receiving the official response from George May, who were directly in charge of officiating the shakedown, Petitioner was informed that the property that were confiscated was designed to be shipped to his home; The Petitioner property was consisted of, amongst other things as listed in exhibit (C), law books, two transcripts, a copy of Petitioner's post-conviction petition, plus, numerous motions and legal correspondences. E. Maxwell the official that was direct in charge of shipping residents as well as Petitioner's property home after it was confiscated from his assigned cell.

4. The Institutional Inquiry Board heard Petitioner grievance on April 19, 1979, the Board accepted jurisdiction, heard partial of Petitioner grievance and ruled that it had no substance because the prison officials who conducted the shakedown made no records that would substantiate any residents claims. The Administrative Rules and Regulations clearly setforth the criteria that prison officials are suppose to use when searching residents calls or persons, above all, an officials conducting a search is suppose to leave behind for the resident a copy of "Record Form Dissemination to resident" see exhibit (D). The Board also recommended that Petitioner file with the Court of Claims for redress.

5. A second grievance was filed with the Institutional Inquiry Board addressing amongst other things, the like of a redress in the Court of Claims

for such things as legal documents,law books, and personal correspondence. The Board Ruled that the issue had been heard once, and it declined jurisdiction.

6. On May 29, 1979, Petitioner filed a Civil Rights complaint with the United States District Court, Northern District of Illinois, and on October 24, 1979, Petitioner complaint was dismissed for failure to exhaust Administrative remedies.

7. On November 8, 1979, Petitioner filed a notice of appeal, in the United States Court of Appeals, Seventh Circuit, his appeal was granted and on June 20, 1980, his appeal were dismissed, for reason that the Court adopted the decision of the District Court and affirmed the judgment.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED, WHEN THE EXHAUSTION OF ADMINISTRATIVE REMEDIES HAS, AND WOULD HAVE PROVEN TO BE FUTILE.

Petitioner filed a grievance with the Administrative Inquiry Board about the concern of his property that was confiscated from his cell and the property that he mailed in the custody of the Respondent. The Board only had a hearing on partial of the Petitioner property, which was the property that was contained in the mail. There was a second grievance filed with the Administrative Inquiry Board, but the Board responsed throught mail informing Petitioner that his grievance had been heard once on the property issue, and he was inform to file with the Court of Claims, see exhibit (E), attached.

Petitioner felt that if he could not receive a properly ruling from the Administrative Inquiry Board in the concern of all his property instead of partial, he contends that redressing his grievance to the Court of Claims for transcripts, a post-conviction petition, numerous motion, law books, legal correspondence, and other personal property Items, would have eventually resulted into a futule act, because the above property mention is not taxable or determine.

So Petitioner contention that a Court and not the prison system was the most appropriate remedy to seek redress of his grievance. But the Courts that he previous redressed his grievance to, failed to realize that the prison Inquiry Board refused to grant him relief on the basis of a lack

of documentation and other property that was confiscated from his cell. Which makes it unlikely that his claims or grievance could have been resolved by further Administrative proceedings within the prison system, although he contends that such Administrative remedies attempts would have been futile to seek relief, especially, when his next step in the appeal process would have been to the Director of Corrections, who he seeks to bring in as a party to this action, see Houghton v. Shafer, 392 U.S. 639(1968).

Petitioner claims that after filing two grievances and both attempts have proved to be useless, Petitioner so feels that there was no other remedy required for him, but the Court to redress his grievance to. Which that Administrative remedy is not required before filing 1983 section 42, see Rickets v. Lightcap, 567 F.2d 1226 (1977). The Petitioner agrees with the decision in Rickets v. Lightcap, case, that a state prisoner is not required to exhaust State Administrative remedies before bringing an action under Civil Rights Statute in Federal Court for deprivation of his constitutional rights. Although in recent years, the Court has had frequent occasion to consider the scope of the remedy created in section (1) of the Civil Rights Act of 1871. Compiled as 42 U.S.C. 1983.

The Courts erred by not ruling on Petitioner legal documents that was mention in his grievance, and confiscated with his other property, which he was deprived of the use and enjoyment of that property when the prison officials cofiscated his transcripts, law books, numerous motion, a post-conviction petition, families pictures, legal and personal correspondence, and other property Items. Such deprivation of Petitioner property was a violation of his Fifth and Fourteenth Amendments Rights. And the Respondent's did not deny the fact that the Respondent's violated Petitioner Constitutional Rights when deprived him of his legal materials and other valuables, during the Stateville State of Emergency orded by the Director of Illinois Corrections, see Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, (1961).

If the Court meant what it said in the Monroe v. Pape, Supra at 187, then section 1983 has dispensed with "consciousness of wrong-doing, "and negligent conduct under color of State law which as here, results in a deprivation of a State created property

Right, in actionable under section 1983. The Petitioner claims that the deprivation of legal materials necessary to afford reasonable acess to the Courts violates the Due Process Clause of the Fourteenth Amendment and that a Court should have jurisdiction of a claim for damages based on such deprivation, see Sigafus v. Brown, 416 F.2d 165,(1969). In the Sigafus v.Brown decision, it showed that the Courts erred for dismissing Petitioner complaint, and it would have been an futile attempt for him to further exhaust Administrative remedies seeking relief for his legal documents, See Houghton v. Shafer, 392 U.S.639,88 S.Ct.2119 (1968), DeWitt v. Pail,366 F.2d 682,(1966).

It was and error in the Courts behalf not to recognize the Inquiry Board exhibit that were attached to Petitioner complaint,and acknowledge the fact that the Inquiry Board only ruled on partial of his property, and on the other hand the board would not except the responibility of the prison officials confiscating anything but the mail property, which were prevented from being forward out to Petitioner home. Such evidence clearly states facts involving a liberty interest which the Courts have consistently protected. Such infringement upon Petitioner constitutional Rights as setforth in the Bill of Rights and the First Amendment,"that freedom can not be justified under the quise of a legitimate government interest." And the Respondent's did not deny that the prison officials confiscated Petitioner mail, which was consisted of family pictures, cigarettes, a letter to his Mother, legal materials that his Mother were supposed had taken to a counsel. Seeking a return of these items would be futile to resort to the Administrative remedies or appealing to the Director of Corrections for relief.

Unlike the mail that Petitioner had mailed but were never sent out by the Respontent's, Petitioner had a Right for his mail to be sent out, whereas he is aware that the prison officials have a Right to inspect his mail before turning it over to the postage, but not seize the mail from the party that Petitioner had forwarded it to, Corby v. Conboy, 457 F.2d 251 (1972).

Despite the facts of other Courts decisions, Petitioner agrees with the decisions of, McNeese v. Board of Education, 373 U.S. 668,83 S.Ct.1433(1963), Damico v. California, 389 U.S. 416,88 S.Ct.526 (1967), Monroe v. Pape, 365 U.S.167,81 S.Ct. 473 (1961); Houghton v. Shafer, 392 U.S. 639, 88 S.Ct. 2119(1968). In the mention cases which states that the requirement of exhaustion of Administrative remedies has no applicability where those remedies would be inadequate or where their exhaustion would certainly or probably be futile, as here, in this matter.

Petitioner contends that because of the value of his property could adequately be assessed, he was required to exhaust Administrative remedies. But none of the property has been returned to the Petitioner's, and only partial of the property confiscated can be assessed in monetary terms. Although legal materials, which includes two transcripts, numerous motions, post-conviction petition, and legal correspondence were also apart of the property confiscated, such legal materials could not be assessed,or determined as monetary terms, or in fact be conpensated for such materials through exhaustion of State Administrative remedies.

So Petitioner only alternative was to redress his grievance to the Court for the damages he suffered after the confiscation of his legal materials and other Items, for the legal materials no adequated value could have been determined, especially, when Petitioner materials was not appraise, and other then that he still have litigations pending in the Court.

The property that was confiscated from the Petitioner cell were not listed in the prison property order as contraband property, so he should had been allow to keep all of the property that were confiscated from his cell. The Petitioner also should have been allow to have a list of the property that were confiscated, when the Administrative Rules required that a report

be wrote on all property that be confiscated from a prisoner cell's, one copy of the report to the inmate and a copy for the Administrated file, see exhibit (d) p.6,(L). Petitioner claims that such act as the Respondent's confiscating his property Items and his legal documents, leaves him to believe that the Respondent's did not want him to have access back into the Courts for an appeal process, such action were a violation of Petitioner Fifth and Fourteenth Amendment Rights, see Wolff v. Mc Donnell,418 U.S. 539,94 S.Ct.2963, 41 L.Ed.2d 935, (19___).

In this case,exhaustion of State Administrative remedies would no doubt amounted to be a futile act. Lane v. Maryland, 320 F.2d 179(1963), Wilwording v. Swenson,404 U.S. 249,30 L.Ed. 2d 418, 92 S.Ct.407(1971). Any event that the Petitioner would have went through the remedy procedure, redressing his grievance to the Director of Corrections and the Court of Claims, as the Courts sugested, both would had been inadequate to award the Petitioner a full adequate relief, because partial of the property was not taxable to fix or estimate the value.

II. CERTIORARI SHOULD BE GRANTED TO INSURE THAT THE DISTRICT COURT WILL NOT DISMISS A COMPLAINT WITHOUT HEARING ALL DOCUMENTS THAT HAVE BEEN PRESENT TO BE RULED UPON.

The Petitioner claims that the District Court erred by not ruling on his motion to amend and supplement his complaint, before dismissing it. To declare the reason for such ruling on the said motion, so that Petitioner's may have had an opportunity to correct any deficiencies that might have appeared, or to properly refile the motion for the Court's consideration.

There was no specific reason why the Court failed to make a ruling on Petitioner motion, unless the Court were prejudice toward the Petitioner. Whereas Petitioner was aware that a failure,

in an initial complaint, to set-forth the claim by means of a short and plain statement as required by Rule 8 (a) (2), is not a ground for dismissal of an action with prejudice, since there are procedures available for correcting a vague or prolix complaint, and such correcting if any deficiencies had appeared in the complaint, the motion to amend and supplement would have made it distinct and brief for the Court's interpretation, but the Court failed to Rule on his motion, which showed that the District Court were not fair and impartial when not taken all documents under consideration before making an fair decision.

It is stated clearly in Rule 15, that a party has a right to once amend his pleading as a matter of any course. And Rule 15 (a), states that while the granting of leave to file an amended complaint is within the sound discretion of the Court, leave to do so shall be freely given when justice requires. In these cirumstance, an error, in dismissing the Petitioner's complaint without affording him the privilege of amending under Rule 15. Foman v. Davis,371 U.S.178,182, 83 S.Ct.227, 9 L. Ed.2d 222(1962).

The Courts has constantly made clear in such decisions as Amstrong v. Rushing,352 F.2d 836 (1965), Fötter v. McCall,433 F.2d 1087 (1970), Dodd v. Spokane County,393 F.2d 330 (9th Cir. 1969), Harmon v. Superior Court,307 F.2d 796(1962), that a person who is presently incarcerated in a State prison, and is not entitle as a might of right to appear personally at a hearing in a Civil Right Action. Is however, entitle to have (1) process issued and served,(2) notice of any motion there after made by Respondent or the Court to dismiss the complaint and the grounds thereof, (3) an opportunity to at least submit a written

memorandum in opposition to such motion, (4) in the event of dismissal, a statement of the grounds therefor, and (5) an opportunity to amend the complaint to over come the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment.

But in the instant matter the District Court did not follow the proper procedure as outlined in the prior decisions, which such decision that the Court did Ruled on dismissing Petitioner complaint before ruling on his motion, gave him the reason to believe that the law have contrived against him, when the law states that he was supposed has been entitle to amend his complaint for such reason that he deem was necessary to correct the deficiencies that may have appeared in his complaint.

Such action as, dismissing Petitioner complaint, before the Court's has taken all of the available documents under full consideration, was a violation of due process and equal protection of law. Petitioner feels that the Court has abused its discretion by denying him the opportunity to amend his complaint, or hear his motion before reaching an decision to dismiss his complaint, pursuant to Rule 19 (a), where there were parties subject to be served and notified of Petitioner's claims.

A necessary predicate to a cause of action under 42 U.S.C. Section 1983 is that the Respondents act "under color of state law". Shelley v. Kraemer,334 U.S. 1, 63 S.Ct. 836, 92 L. Ed. 1161 (1948). As alleged in Petitioner Amendment and Supplement, (see appendix (F),attached), the Respondents in questioned were proper parties. Respondent Lou Brewer's motion to be dismissed as a proper party was based upon the contention that he was not responsible for the conduct of the officials wording under his directive, besides Respondent Lou Brewer should be held liable for negligence in failing to give the officials adequate traning

and supervision of there conduct, he is legally responsible for the altercation that took place at Stateville, Carter v. Carlson,447 F.2d 358(1971).

Petitioner motion pursuant to Rule 19 (a), should have been heard upon Respondent Lou Brewer's reasoning,Petitioner's claims would have been in jeaopardy for like of jurisdiction. If in fact Petitioner's complaint stated a claim upon which relief could have been granted, but the District Court indeed errored by dismissing his complaint based upon a technicality, Conley v. Gibson,355 U.S. 41,45,46, 78 S.Ct.99,102., 2 L.Ed.2d 80 (1957).

In this case the technicality be the failure to exhaust Administrative remedies, Asher v. Harrington, 461 F.2d 890 (1972).

CONCLUSION

It is therefore respectfully submitted that certiorari be granted to review the judgment of the court of appeals entered in this case.

Dane Lamar Jenkins
Petitioner

Dane Lamar Jenkins #C-72233
P.O. Box 112
Joliet, Illinois 60434

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rule of the Supreme Court of the United States, I hereby certify that on the 11th day of July, 1970, I left a copy of the foregoing Petition for a writ of Certiorari at the Northern District of Illinois, at Room _____, Federal Building, Chicago, Illinois, and by mailing a copy in a duly addressed envelope with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Dane Lamar Jenkins

Dane Lamar Jenkins C-72253

Appendix (1)

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 79 C 2138 Date Oct. 25, 1979

Title of Cause DANE LAMAR JENKINS v. LOU BREWER, Warden

Brief Statement of Motion

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DOCKETED

OCT 25 1979

Reserve space below for notations by minute clerk

Memorandum Opinion and Order entered.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

(DRAFT)

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS, Plaintiff,	)	
-vs-	)	NO. 79 C 2188
LOU BREWER, Warden, Defendant.	)	

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER:

Richard M. Bilby
United States District Judge

DATED: October 24, 1979.

Appendix (B)

Unpublished Per Curiam Order

JUDGMENT - ORAL ARGUMENT

United States Court of Appeals 13

For the Seventh Circuit

Chicago, Illinois 60604

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 79-C-2188
Bernard M. Decker, JUDGE

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of the court entered this date.

*The Honorable John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation

FPI—MAR—12-12-78-12M-1151

Appendix (B 1)

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED MAY 28, 1980)

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2188
Bernard M. Decker, Judge.

ORDER

Plaintiff-appellant Dane Lamar Jenkins appeals an order dismissing his complaint brought under 42 U.S.C. § 1983. Plaintiff alleged that certain property valued at approximately $600 was taken from him without due process of law during a prison "shakedown."

Having examined the record, addressed the briefs, and heard oral argument on behalf of the parties, we agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). Accordingly, for the reasons stated in Judge Decker's attached Memorandum Opinion and Order of October 24, 1979, which we adopt as the decision of this Court, the judgment of the district court is affirmed.

AFFIRMED.

*The Hon. John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation.

FPI—MAR—12-12-78-12M-1191

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS, Plaintiff, -vs- LOU BREWER, Warden, Defendant.	)	NO. 79 C 2188

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER: Bernard M. Decker
United States District Judge

DATED: October 24, 1979.

No. 80-5116

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS, PETITIONER

v.

LOU BREWER, WARDEN, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 25, 1980.
CERTIORARI GRANTED NOVEMBER 10, 1980.

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

(79 C 2188)

IN DANE LAMAR JENKINS

v.

LOU BREWER

Date	Item
5-29-79	Complaint received
5-29-79	Petition for leave to proceed *in forma pauperis* and supporting affidavit filed
6-5-79	Grant of leave for plaintiff to file and proceed *in forma pauperis*
8-7-79	Defendant's Motion to Dismiss or for Summary Judgment with Supporting Memorandum filed
8-22-79	Plaintiff's motion for leave to amend and supplement plaintiff's original complaint filed
9-10-79	Plaintiff's motion in opposition to defendant's motion to dismiss with supporting memorandum of law filed
10-25-79	Judgment entered by district court dated 10-24-79
10-25-79	Memorandum opinion and order entered by district court dated 10-24-79
10-29-80	Plaintiff's motion for appointment of counsel filed
11-14-79	Plaintiff's notice of appeal from order enter 10-24-79, motion for leave to appeal in forma pauperis, motion for leave to proceed in forma pauperis filed
11-20-79	Grant of leave to appeal *in forma pauperis*
6-20-80	Judgment entered by Court of Appeals

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2188

Judge Decker

DANE LAMAR JENKINS, PLAINTIFF

vs.

WARDEN LOU BREWER,
DEPARTMENT OF CORRECTIONS, DEFENDANT

COMPLAINT UNDER THE CIVIL RIGHTS ACT,
TITLE 42, SECTION 1983 U.S.C.

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

NO.

B. If your answer to A is yes, describe each lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:

Plaintiffs: Dane Lamar Jenkins
Defendants: Warden Lou Brewer

2. Court (if federal court, name the district; if state court, name the county):

3. Docket number:

4. Name of judge to whom case was assigned:

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Approximate date of filing lawsuit:

7. Approximate date of disposition:

II. Place of Present Confinement: P.O. Box 112, Joliet, Illinois 60434

A. Is there a prisoner grievance procedure in this institution?

YES.

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure?

YES.

C. If your answer is YES:

1. What steps did you take?

I informed the grievance committee about my property that the officers took during the shake down lockup.

2. What was the result?

I was told to show them a property list that I had in my possession, after showing the list, I was inform to file to the court of claims. I notified the grievance committee regarding my personal property that was confiscated by officers of this institution during the shake down lock up at stateville correctional center.

Prior to the incident I was required by the grievance committee to show a property

list of the valuable taken. I then was requested by the grievance committee to filed to the court of claims.

D. If your answer is NO, explain why not:

III. Parties

(In item A below, place your name in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of plaintiff: Dane Lamar Jenkins #C72233

Address: P.O. Box 112, Joliet, Ill. 60434

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

B. Defendant Lou Brewer, Warden is employed as WARDEN at STATEVILLE CORRECTION CENTER

C. Additional Defendants: Department of Correction

IV. Statement of Claim

State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. (Use as much space as you need. Attach extra sheet if necessary.)

On february 2, 1979 I was transferred from menard to stateville correctional center. When I enter stateville correctional center, a shake down was in process I was advised that certain property would be deen controband and would be taken away from me. after the shake down, property valued at over 600.00 dollars was missing from my cell, taken out of my cell by tact unit officers of stateville correctional center, who were conducting the search on the day in question. I was not in my cell of anywhere around when my personal property was taken out of my cell. I was later informed that personal property that was taken out of residents cell would be mailed home at state expense. Prior to the shake down, I send in the mal (postal service) 74 packs of cigarettes to my family, but my family never received the packages. included in this personal mail were photographs, legal mail, that to this date were not send home or mail out, from the institution. I was informed by my family that certain personal property was never received by them that the institution alledge that they had mail to my family at state expense. I was advised by the institution to file a grievance regarding the matter of my personal property, which was filed by myself on april 1979, with negative results. (*see affidavit attached*)

V. Relief

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.

Want the persons responsible (Lou Brewer, Department of correction) to reinverse me for personal property that was taken from me illegally approx. $600.00 dollars, and for damages suffered as a cause of personal property being taken from me illegally the amount of $10,000. dollars.

Signed this APRIL day of 29, 1979.

Dane Lamar Jenkins C-72233
(Signature of plaintiff or plaintiffs)

VERIFICATION

State of ————————)

County of ————————)

————————————, being first duly sworn, under oath, says: that he is the plaintiff in this action and knows the content of the above complaint; that it is true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

Dane Lamar Jenkins
(Signature of affiant-plaintiff)

Subscribed and sworn to before me this 21st day of May, 1979.

————————————

(Notary Public or other person authorized by law to administer an oath)

EXHIBIT (C)

This is a list of the personal property of inmate Dane Jenkins No. C-72233, who was transferred to Stateville Correctional Center On February 2, 1979. Personal Property must be taken to the Clothing House before 1:00 p.m. on this date: February 1, 1979.

* Angel Skin Lotion	___ Law Books--Personal	___ Text Book--Soft Covers
* Ash Trays, Commissary	___ Lead Pencils	___ Tobacco
___ Ball Point Pens	1 Legal Paper, Comm--Bond	___ Towels, Commissary
* Belts, Commissary	1 Legal Paper, Comm--Onionskin	___ Tooth-paste
* Bugler--Cans	1 Legal Documents	* Tooth-brushes
* Cards, Assorted	1 Letters, Personal	* Tooth-powder
* Candy Bars	1 Letters, Official	___ Tweezers
* Canned Food	___ Looseleaf Notebooks	___ Undershirts, Commissary
___ Can Openers	___ Matches, Book	___ Vicks Salve
* Chess Sets	___ Mechanical Pencils	___ Wash Cloths, Commissary
* Checker Sets	___ Music Books	*
* Chess & Checker Boards	1 Nail Clippers	*
* Chewing Tobacco	___ Paint Brushes	*
___ Court Transcripts	___ Painting Boards	
* Cookies	___ Paints Oil	
___ Combs	___ Paint Thinner	
* Cigarettes	* Paints, Water Colors	
___ Cigars	* Photo Albums Commissary	
___ Crayons	___ Photographs, Personal	
___ Dentures ☐ Upper ☐ Lower	___ Pipe Tobacco	
___ Deodorant Stikcs, Commissary	___ Playing Cards	
___ Dictionary	___ Shoes, Commissary, Dress	
1 Erasers	___ Shorts, Jockey, Commissary	
* Eyeglasses & Cases	___ Shorts, Boxer, Commissary	
* Fountain Pens	___ Socks, Commissary	
* Classes & Cups--Plastic	___ Soap Dishes, Commissary	
* Handkerchiefs, Commissary	___ Soap Bars, Commissary	
___ Hair Brushes	___ Sweatshirts, Commissary	
___ Hair Grease	___ Talcum Powder, Commissary	
___ Hair Oil	* Tee Shirts, Commissary	
___ House Slippers	___ Text Books--Hard Covers	

* _____
INMATE

* _____
Checking Officer

cc: Inmate [*Illegible.]
File

[List of Plaintiff's Personal Property When Transferred from Menard to Stateville]

FORM 497
PRINTED AT MENARD

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

AFFIDAVIT

I, Dane Lamar Jenkins, #C-72233, state the following is true in fact and is approximately what was taken from me in the lockdown at the Stateville Correctional Center, March 19, 1979, the date in question.

Legal Correspondence
Personal Correspondence
Numerous Motions
Two Transcripts
Post-Conviction Petition
Pictures
168 Packages of Cigarettes ($75.50)
1 Timex Watch ($79.00)
1 Pair Reptile Shoes ($162.00)
1 Blue Jean Suit ($39.00)
1 Commissary Shirt ($13.00)
1 Pair Socks ($1.50)
1 Pair Nylon Underwear ($4.00)
1 Cross and Chain ($13.50)
1 Blk & White TV, Panasonic, Blk & Yl. Case ($100.00)
4 Rugs ($24.00)
1 Blanket ($4.00)
1 Blue Jean Jacket ($21.00)
1 Blue Jean Pants ($18.00)
2 Nylon Undershits ($4.00)
2 Body Powder ($3.76)
4 Cocoa Butter ($8.00)
2 Face Towels ($4.00)
1 Stinger (.69)
13 Ink Pens
2 Shaving Powder ($1.20)
6 Shampoo ($9.00)
3 Hair Conditioner ($3.79)

PREVIOUS PAGE WAS BLANK

2 Bottles Noxzema ($2.99)
2 Nail Clippers ($1.38)
29 Write Outs Envelopes ($4.64)
2 Spools Thread (commissary) ($.80)
2 Shower Shoes ($6.00)
1 lb & ½ Coffee ($7.00)
1 Headphones ($29.00)
1 Sweatshirt ($4.98)
6 Tubes Clearisol ($10.00)
4 Angel Skin Lotion ($6.76)
10 Greeting Cards ($10.00)
7 Deodorant Sticks ($10.50)
1 Dictionary ($9.75)
1 Plastic Glass ($1.79)
3 Hair Brushes ($7.47)
5 Hair Grease ($13.94)
2 Hair Oil ($2.78)
3 Law Books ($45.00)
1 Ream Legal Paper Bond. ($3.50)
1 Ream Legal Paper Onionskin ($4.00)
1 Photo Albumn ($4.00)
33 Bars Soap ($14.85)
8 Text Books ($18.00)
8 Towels ($32.00)
4 Tubes Toothpaste ($5.80)
2 Toothbrushes ($1.38)

Affiant
/s/ Dane Lamar Jenkins
DANE LAMAR JENKINS
Reg. No. C-72233
Box 112
Joliet, Illinois 60434

SUBSCRIBED and SWORN TO Before me this — day of ————, 1980.

_____

Notary Public

STATEVILLE CORRECTIONAL CENTER
INSTITUTIONAL INQUIRY BOARD

Cell: E-456

TO: Warden

FROM: The Institutional Inquiry Board:

RE: *GRIEVANCE*:

GRIEVANT: Resident Jenkins—NO. C 72233

DATE THE GRIEVANCE WAS RECEIVED: N/A

DATE THE BOARD CONVENED TO HEAR THE GRIEVANCE: 4-19-79

HEARING:

This resident's grievance was personally interviewed by the Board. His Master Record File was reviewed. All of the information forwarded to the Board concerning the issue was carefully examined. He requests that his grievance be investigated and remedial action taken.

This resident states he has tried to resolve this grievance through the other avenue available to him at this facility, and the Inquiry Board accepts jurisdiction of this issue.

NATURE OF THE GRIEVANCE:

The issue being grieved by this Resident is: PERSONAL PROPERTY LOSS: Photographs, legal mail and 74 packages of cigarettes.

The above items were sent through the mail on March 16, 1979, through the mail office to Denise Jones in Chicago. He removed stamps from pre-stamped envelopes and attached them to the large legal envelope containing the cigarettes and gave them to Lt. Lyles.

FINDINGS:

—— The Board finds that this Respondent's grievance has no substance.

The basis for this finding is: Lt. Lyles was contacted and indicates that he has no knowledge of the package described. Mail office has no record of package being received or sent. No shakedown record from cell. The committed is able to verify that 168 packages of cigarettes were sent to S.C.C. from Menard in February.

RECOMMENDATION:

—— The Institutional Inquiry Board finds that: The package in question can not be verified as having left the cellhouse or being in existence. Resident may file in Court of Claims.

is/is not being complied with—and recommends that XXXXXXX/no redress be granted.

Redress Granted: NONE.

—— I concur —— I do not concur ——————
WARDEN

Copies To: Adj. Comm. Captain
Assign. Comm. Captain
Shift Captains Office
Record Office
Business Office

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2188

DANE LAMAR JENKINS, PLAINTIFF

vs.

LOU BREWER, WARDEN DEPARTMENT OF CORRECTIONS, DEFENDANT

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT WITH SUPPORTING MEMORANDUM

Now come the defendants Lou Brewer and the Illinois Department of Corrections, by their attorney, WILLIAM J. SCOTT, Attorney General of the State of Illinois, and respectfully move this Court to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted or to grant summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56.

In support of this motion defendants submit the following memorandum of law:

I. INTRODUCTION

Plaintiff, an inmate of the Stateville Correctional Center, Joliet, Illinois, seeks compensatory damages of $600.00 and punitive damages of $10,000.00 against defendants for the illegal taking of various items of personal property. The following exhibit is attached: Exhibit "A", photocopy of Administrative Rule 845 of the Illinois Department of Corrections.

II. THE DEPARTMENT OF CORRECTIONS IS NOT A PROPER DEFENDANT UNDER THE PROVISIONS OF THE CIVIL RIGHTS ACT.

The Department of Corrections should be dismissed as a defendant because it is not a person within the meaning of 42 U.S.C. sec. 1983. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961); *Fitzgerald* v. *Pateo Memorial Hospital*, 523 F.2d 716 (7th Cir. 1975).

III. DEFENDANT BREWER CANNOT BE HELD LIABLE UNDER THE THEORY OF RESPONDEAT SUPERIOR.

Where, as here, monetary damages are sought, the doctrine of respondeat superior is not applicable. *Adams* v. *Pate*, 445 F.2d 105 (7th Cir. 1971). A showing of personal involvement of the defendant is required, and no showing has been made in the instant case.

IV. PLAINTIFF HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES

A state prisoner, alleging deprivation without due process, of tangible items of personal property of no great monetary value, should be required to utilize readily available prison grievance procedures before resorting to federal civil rights litigation. *Secret* v. *Brierton*, 584 F. 2d 823 (7th Cir. 1978). The attached Administrative Regulations of the Department of Corrections, as well as plaintiff's complaint establish that he has failed to exhaust his available state remedies in the instant case.

Plaintiff's complaint filed with the Institutional Inquiry Board was denied April 19, 1979. Although Rule H, I and J of Administrative Regulations allow for appeal to the Director of the Department of Corrections, plaintiff failed to take any further action. As such, his failure to exhaust his administrative remedies should bar his federal civil rights action.

CONCLUSION

WHEREFORE, defendants move this Court to dismiss the complaint or, in the alternative to grant summary judgment in their favor.

Respectfully submitted,

WILLIAM J. SCOTT
Attorney General of Illinois

By: /s/ Stuart H. Shiffman
STUART H. SHIFFMAN
Assistant Attorney General
500 South Second Street
Springfield, Il 62706
(217) 782-1090

EXHIBIT "A"

ADMINISTRATIVE REGULATIONS

[SEAL]

STATE OF ILLINOIS
DEPARTMENT OF CORRECTIONS
ADULT DIVISION

SUBJECT:

Grievance Procedures for Residents

I. POLICY OF DEPARTMENT: To provide an opportunity for residents to air and seek resolution to complaints, problems and grievance which they have not been able to resolve through other avenues available at the institution or facility. Such a grievance procedure ensures the involvement of local and departmental administrators with individual residents' problems and ensures that all residents are treated in an equitable manner.

II. EXPLANATION:

A. As a matter of policy, the Chief Administrative Officer of each Adult Division institution or facility shall install locked mailboxes in all cellhouses, dormitories and residential units into which residents may place written complaints and grievances designated for the Chief Administrative Officer or the Chairman of the Institutional Inquiry Board. All communications placed in these boxes by residents are to be collected daily and routed directly to the addressees.

B. Each Chief Administrative Officer shall appoint three employees to serve on the Institutional Inquiry Board to attempt to resolve problems, complaints and grievances that residents have been unable to resolve through normal channels. One of these employees shall be designated as Chairman of the Inquiry Board. The Chief Administrative Officer shall also appoint several alternate mem-

bers who may serve in the absence of a regularly-appointed Board member. At least one member of every such Inquiry Board shall be a superior officer of lieutenant rank or above, and at least one member shall be a Program Services staff member.

C. No person directly responsible for the condition or action being grieved or who has been a member of the Adjustment Committee which heard a Resident Information Report based on the same set of facts out of which the incident being grieved arose may sit on the Inquiry Board that hears that particular case.

D. The Institutional Inquiry Board shall meet at least weekly, providing one or more problems, complaints, or grievances have been filed with the Chairman of the Board.

E. A resident must have an opportunity to appear before the Institutional Inquiry Board and the Board shall have the right to summon any other witnesses—residents or staff—it deems appropriate.

F. The Institutional Inquiry Board shall file a written report regarding its findings and recommendations with the Chief Administrative Officer within 10 working days after the complaint is received by the Chairman of the Inquiry Board.

G. The Chief Administrative Officer or his designee shall, after evaluating the Inquiry Board's report, advise the resident in writing as to what action, if any, he has taken or intends to take within five calendar days after receiving the Board's report. Copies of the resident's letter to the Board, copies of the Board's report to the Chief Administrative Officer, and copies of the Chief Administrative Officer's response to the resident shall be maintained.

H. If, after receiving the official response from the Chief Administrative Officer, the resident still feels that the problem, complaint or grievance has not been resolved to his/her satisfaction, he/she may appeal in writing to the Director of Corrections.

I. The Director of Corrections and/or his designee will review all such complaints, problems or grievances submitted. If, after reviewing all the reports from the Institutional Inquiry Board and the local administration, the Director feels that the case is without merit, he will so advise the resident in writing.

J. If the Director is of the opinion that the case has merit or that further investigation of the complaint, problem or grievance is in order, he will refer the matter to the Administrative Review Board.

K. A three-member Administrative Review Board shall be appointed by the Director, and at least one member of the board shall be an individual not employed by the agency.

L. The Administrative Review Board will meet as frequently as necessary and may schedule hearings at Adult Division institutions. When such hearings are scheduled, the board shall have the authority to call witnesses before it—residents and staff.

M. The Administrative Review Board shall file with the Director of Corrections a written report which shall contain the board's findings and recommendations.

N. The Director will make a final determination and so advise the resident in writing.

O. Residents of Adult Division institutions and facilities must be informed of these procedures in writing by the Chief Administrative Officer.

P. Under no circumstances may any disciplinary action be taken against a resident for using the procedures established herein.

Q. When recommendations relative to the revocation of good conduct credits are rendered and concurred with by the Chief Administrative Officer, and the amount of time recommended for revocation exceeds 30 days in a 12-month period—effective February 1, 1978—an automatic review of those actions will be undertaken directly by the Administrative Review Board.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2188

DANE LAMAR JENKINS, PLAINTIFF

vs.

LOU BREWER, Individually and Officially
GAYLE FRANZEN, Indiv. and Officially
GEORGE MAY, Indiv. and Officially
E. MAXWELL, Indiv. and Officially,
DEFENDANTS.

MOTION FOR LEAVE TO AMEND AND SUPPLEMENT PLAINTIFF'S COMPLAINT.

Presiding Judge: DECKER

MOTION FOR LEAVE TO AMEND AND SUPPLEMENT PLAINTIFF'S ORIGINAL COMPLAINT

Now comes, Dane Lamar Jenkins, petitioner herein, who respectfully request permission to Amend and Supplement his original complaint.

In accords with Rule 15(a), (c)2 and (d) of the Federal Rules of Civil Procedure, which set forth in its provision, that before a party may amend his original complaint after a responsive pleading, he must request permission by leave of Court to so amend. And, only when justice so requires will permission be granted.

In accords with Rule 19(a) of the Federal Rules of Civil Procedure, Plaintiff seek permission to join Defendants Gayle Franzen, George May and E. Maxwell, as the Rule so allow, and by leave of Court.

In keeping with Rules 15 and 19, Plaintiff, by joining the additional Defendants and clarifying his allegations against each Defendant, he seeks to reflect the true nature of his complaint.

Claim I. Plaintiff's original Complaint was filed in this cause on May 29, 1979. Plaintiff alleged that during the declared State of Emergency, at Stateville Correctional Center, personal property valued at approximately $600.00 dollars was illegally confiscated from him by John Doe officers acting under orders issued by Defendants Lou Brewer, Gayle M. Franzen and George May. (See, original Complaint and Affidavit setting forth confiscated items.)

Claim II. Lou Brewer, at the time of Plaintiff's original Complaint, was the acting Warden and Chief Administrative Officer of the Stateville Corr. Center. And as such, Brewer was legally responsible for the welfare, safety and security of the Residents therein. And, Brewer was likewise responsible for the overall operations within the Stateville Institution on February 24, 1979. By enforcing the memorandum directive issued by Defendant Gayle Franzen, and by issuing direct orders to that effect, Brewer did enter into a conspiracy with named Defendants for the expressed purpose of violating Plaintiff's Constitutional Rights as set forth in the Bill of Rights and the Fifth and Fourteenth Amendments.

Claim III. Gayle Franzen is the Director in charge of the Illinois Department of Corrections. And as such, Franzen is legally responsible for the overall operations and administration of each institution under its jurisdiction; including the Statesville Corr. Center; whereat, he acting in collusion with others, planned and implemented a State of Emergency and subsequent lock-down, search and confiscation of Plaintiff's personal property as setout in his original complaint; said actions were initiated on February 24, 1979.

Claim IV. George May, at the time of Plaintiff's original Complaint, was the Administrative Assistant to the Warden of Stateville. And as such, May was legally responsible for the welfare, safety and security of the Residents and their personal property during the shakedown on February 24, 1979. Defendant May was also directly

in charge of the shakedown procedures conducted by John Doe officers. Defendant May while acting in said capacity did, in collusion with John Doe officers, acted to violate Plaintiff's rights to due process and equal protection of the law, by confiscating the articles as setout in Plaintiff's original complaint.

Claim V. E. Maxwell is the Personal Property Officer-In-Charge, and acting in said capacity, he is legally responsible for the care of Plaintiff's personal property after its confiscation. Maxwell was legally responsible for issuing property permits, sending confiscated property home, or returning said property to Plaintiff, but Defendant Maxwell has fail to act on any of the above alternatives; in violation of Plaintiff's Fifth and Fourteenth Amendment rights.

Claim VI. Plaintiff claims that the memorandum of February 24, 1979 did not adequately inform him of the consequences of the lockdown, or detail in any manner, what exactly was required of him to protect his personal property; and failed to describe the items of personal property that would be considered contraband.

Claim VII. Plaintiff claims that the Defendants through their actions and the acts of their agents, have denied him the benefits of Due Process and Equal Protection of the laws as setforth in the United States Constitution.

Claim VIII. Plaintiff claims that the confiscation of personal property items from his cell was arbitrarily and capriciously done and the Defendants failed to regard the requirements of the Administrative Rules of Regulations governing shakedown procedures; which require that a slip identifying the items taken; the officers name that conducted the shakedown and where the confiscated items would be found.

Claim IX. Plaintiff claims that John Do officials failed to issue him a Rule Violation Report so that he would be properly informed of any pending charges; or, reasons for said confiscation of his personal property, in

violation of the Administrative Rules of Regulations and his right to Due Process and Equal Protection of the law.

Claim X. Plaintiff claims that the named Defendants fail to properly instruct the John Doe officers conducting the shakedown as to what would constitute contraband, and as such, no standard criteria was established or promulgated to inform or protect his rights as setforth in the Administrative Rules of Regulations and the United States Constitution.

Claim XI. Plaintiff claims that Defendant E. Maxwell had failed to issue a permit for his personal property, and had knowledge to this effect, and as such is liable for the loss of damage of said items during the shakedown. And, that Defendant Maxwell acting in his official capacity as Personal Property Officer, has withheld from Plaintiff his personal property confiscation as a result of the February 24, 1979 shakedown.

RELIEF

Relief I. Plaintiff ask this Court to review his alleges and upon a finding of probable cause, grant the relief sought; charge the named Defendants with the cost of court, and compensation to the Plaintiff for the loss of his personal property in monetary awards.

Relief II. Plaintiff seek monetary awards for redress of the violation of his Civil and Constitutional Rights as the Court deems fit and proper.

Relief III. Plaintiff seek the amount of $10,000 dollars from each Defendant, Lou Brewer, Gayle M. Franzen, George May and E. Maxwell for compensatory damages.

/s/ Dane Lamar Jenkins
Plaintiff-Petitioner

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

AFFIDAVIT

I, Dane Lamar Jenkins, petitioner herein being first duly sworn upon oath, deposes and avers that the foregoing Motion is true and correct in substance and in fact.

Subscribed and Sworn to Before Me This Sixteenth Day of Aug., 1979.

/s/ Dane Lamar Jenkins
Plaintiff-Petitioner

/s/ [Illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 79 C 2188

DANE LAMAR JENKINS, PLAINTIFF

vs.

LOU BREWER, Warden, DEFENDANT.

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. § 1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in *Secret* v. *Brierton*, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that

exhaustion in this case would have been a futile act, citing *Houghton* v. *Shafer*, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. *Id.* at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner § 1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." *Id.* at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in *Secret*, *id.* at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER:

/s/ Bernard M. Decker
United States District Judge

Dated: October 24, 1979

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

(ARGUED MAY 28, 1980)

June 20, 1980

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 36

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. JOHN F. KILKENNY, Senior Circuit Judge *
Hon. RICHARD D. CUDAHY, Circuit Judge

No. 79-2437

DANE LAMAR JENKINS, PLAINTIFF-APPELLANT

vs.

WARDEN LOU BREWER, Department of Corrections,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

No. 79 C 2188

Bernard M. Decker, Judge

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* The Hon. John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation.

ORDER

Plaintiff-appellant Dane Lamar Jenkins appeals an order dismissing his complaint brought under 42 U.S.C. § 1983. Plaintiff alleged that certain property valued at approximately $600 was taken from him without due process of law during a prison "shakedown."

Having examined the record, addressed the briefs, and heard oral argument on behalf of the parties, we agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by *Secret* v. *Brierton*, 584 F.2d 823 (7th Cir. 1978). Accordingly, for the reasons stated in Judge Decker's attached Memorandum Opinion and Order of October 24, 1979, which we adopt as the decision of this Court, the judgment of the district court is affirmed.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 80-5116

DANE LAMAR JENKINS, PETITIONER

v.

LOU BREWER, ETC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 10, 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 335431 223

No. 80-5116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS,
Petitioner,

vs.

LOU BREWER, Warden, Department of Corrections
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 80-5116

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DANE LAMAR JENKINS, Petitioner, vs. LOU BREWER, Warden, Department of Corrections, Respondent.	On Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether a prisoner must exhaust an effective state administrative remedies before filing an action for the deprivation of civil rights under 42 U.S.C. §1983?

STATEMENT OF THE CASE

Petitioner, Dane Lamar Jenkins, appeals from an order dismissing his complaint under 42 U.S.C. §1983. He alleged that certain property, valued at approximately $600, was taken from him without due process during a prison "shakedown." The dismissal of his complaint was affirmed because he failed to exhaust his administrative remedies.

REASONS WHY THE WRIT SHOULD BE DENIED

The Seventh Circuit correctly concluded that effective state administrative remedies should be exhausted before a prisoner filed a small property damage claim under §1983.

ARGUMENT

A state prisoner who alleges the deprivation of tangible items of personal property of no great monitary value* should be required to exhaust available, effective state administrative remedies prior to filing a claim under 42 U.S.C. §1983. Of course, exhaustion of state judicial remedies is not a prerequisite to filing a §1983 action because this section was enacted by Congress to be a remedy which is supplementary to the state court remedy. Monroe v. Pape, 365 U.S. 167, 5 L. Ed. 2d 492 (1961). However, the exhaustion of state administrative remedies can be distinguished from the exhaustion of state judicial remedies. In Secret v. Brierton, 584 F. 2d 823 (7th Cir. 1978) the Seventh Circuit stated:

> * * * One of the important purposes of §1983 was to provide a federal forum for an evenhanded enforcement of the law that was not always available in the state courts. That purpose would be frustrated if plaintiffs were forced to sue first in the state court where the resulting judgment would create collateral estoppel effects. The same problem does not arise with the exhaustion of state administrative remedies. (584 F. 2d 826).

The general rule requires that state administrative remedies be exahusted before federal review may be invoked. However, this general rule is not followed in §1983 actions for state prisoners. Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. CHI. L. REV. 537, 538 (1974). Federal prisoners, on the other hand, are required to exhaust administrative remedies in civil rights suits. See, e.g., Waddell v. Aldridge, 480 F. 2d 1078 (3d Cir. 1973).

---

* Illinois law defines a "small claim" as one involving $1,000 or less, exclusive of interest and costs. (Ill. Rev. Stat., 1979, Ch. 110A, §281).

This Court has not directly addressed the issue presented by this case, although it has, in general terms held that state administrative remedies need not be exhausted prior to filing a §1983 claim. See: Houghton v. Schafer, 392 U.S. 639, 20 L. Ed. 2d 1319 (1968); Damico v. California, 389 U.S. 416, 19 L. Ed. 2d 647 (1967); Mc Neese v. Board of Education, 373 U.S. 668, 10 L. Ed. 2d 622 (1963). However, each of these holdings was arguably predicated upon the inadequacy of the state administrative procedure. See: Discussion in Secret, 584 F. 2d 826-27. Furthermore, none of the foregoing cases dealt with prisoner small claims.

In the past few years state prisoners have, with increasing frequency, turned to the federal forum in order to challenge prison regulations and conditions of their confinement. For example, in Mc Cray v. Burrell, 367 F. Supp. 1191, 1217-18 (D. Md. 1973), rev'd, 516 F. 2d 357 (4th Cir. 1975), cert dismissed as improvidently granted, 426 U.S. 471 (1976), Chief Judge Northrop noted that during the period from 1970 through April 5, 1973, the plaintiff in that case had filed a total of thirty-seven §1983 actions. The lack of an exhaustion requirement for such prisoner suits has been criticized. Comment, State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdiction and the Availability of Adequate State Remedies, 7 SETON HALL L. REV. 366 (1976).

Federal jurists have lamented the "flood" of prisoner civil rights cases (Watson v. Ault, 525 F. 2d 886, 889-90 (5th Cir. 1976)), particularly small claims by prisoners. See, Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORD. 557, 566,569. Some lower federal

courts have attempted to summarily dispose of prisoner small claims cases. For example, in Rhodes v. Sigler, 448 F. 2d 1237 (8th Cir. 1971), the court dismissed a §1983 claim for $2.46 stating that this section does not embrace as a civil right the deprivation of a "mere property right." (488 F. 2d 1238). Likewise, in Nickens v. White, 526 F. 2d 802 (8th Cir. 1976), the court characterized the deprivation of an office supply catalogue as "de minimis." In contrast, however, other lower federal courts have allowed the §1983 claim to proceed without exhaustion no matter how small the damage claim. See, e.g., Russell v. Bodner, 489 F. 2d 280 (3d Cir. 1973) (claimed deprivation of seven packages of cigarettes).

Exhaustion of effective administrative remedies in cases involving small property damage claims is one way in which the lower federal courts can effectively deal with the volume of prisoner small claims cases. Advantages to the exhaustion of such remedies would include: 1). the refinement and clarification of the issues presented for resolution; and 2). the state administrative fact finding process would be of great assistance to the courts, since such claims often turn on the facts. Secret, 584 F. 2d 829. Although it is conceded that exhaustion will delay the prisoner's opportunity to present his suit in the federal court, the effects of this delay are somewhat mitigated by the fact that it is likely that once administrative remedies have been exhausted the prisoner's claim could be handled more expeditiously in the federal court. See: Secret, 584 F. 2d 829.

Where a state provides an adequate, clear and effective administrative process, exhaustion of such remedies is plainly advantageous, particularly where the claim is small. Exhaustion of administrative remedies through an internal agency which is familiar with prison problems can furnish an intellegent ruling---explaining the claim and assisting the court in assesing the merits of the pro se complaint.

Finally, exhaustion of state administrative remedies in such cases would further allow federal courts to play a less intrusive role in the operation of the state prison systems. Secret, 584 F. 2d 830. Many prisoner claims would be administratively mooted, thereby obviating the need for federal intervention. In summary, therefore, it is submitted that the exhaustion of effective state administrative remedies is supported by principles of comity, federalism and judicial economy. The decision of the Seventh Circuit Court of Appeals to require exhaustion of such remedies in prisoner cases involving small property damage claims is correct, and certiorari should be denied.

C O N C L U S I O N

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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A P P E N D I X

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604
(ARGUED MAY 28, 1980)

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

June 20, 1980.

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. JOHN F. KILKENNY, Senior Circuit Judge*

Hon. RICHARD D. CUDAHY, Circuit Judge

DANE LAMAR JENKINS,
Plaintiff-Appellant,

No. 79-2437 vs.

WARDEN LOU BREWER, Department of Corrections,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 2188
Bernard M. Decker, Judge.

ORDER

Plaintiff-appellant Dane Lamar Jenkins appeals an order dismissing his complaint brought under 42 U.S.C. § 1983. Plaintiff alleged that certain property valued at approximately $600 was taken from him without due process of law during a prison "shakedown."

Having examined the record, addressed the briefs, and heard oral argument on behalf of the parties, we agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). Accordingly, for the reasons stated in Judge Decker's attached Memorandum Opinion and Order of October 24, 1979, which we adopt as the decision of this Court, the judgment of the district court is affirmed.

AFFIRMED.

---

*The Hon. John F. Kilkenny, Senior Circuit Judge of the Ninth Circuit Court of Appeals, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANE LAMAR JENKINS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	NO. 79 C 2188
	)	
LOU BREWER, Warden,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Dane Lamar Jenkins, acting pro se, has brought this action under 42 U.S.C. §1983 alleging that certain items of his personal property were taken from him in violation of the due process clause of the United States Constitution. Plaintiff is a prisoner in the Stateville Correctional Center, and his property was allegedly taken by prison officials during a "shake down" at the prison, under a declared state of emergency. Defendants have moved to dismiss for failure to state a claim upon which relief may be granted, or for summary judgment.

Defendants allege in support of their motion that the Department of Corrections should be dismissed as a defendant, that the doctrine of respondeat superior is not applicable to this case, and that plaintiff has failed to exhaust his administrative remedies as required by the Seventh Circuit in Secret v. Brierton, 584 F.2d 823 (7th Cir. 1978). In view of the result reached on this last question, it is unnecessary to decide the first two.

Plaintiff did take his complaint to the prison grievance committee, but after it was denied, he failed to utilize the available appeal to the Director of the Department of Corrections, as provided in the Department of Corrections regulations section 845(H). Plaintiff claims that exhaustion in this case would have been a futile act, citing Houghton v. Shafer, 392 U.S. 639 (1968). However, in that case, an appeal was deemed futile because the appeal would have been to the Attorney General, who had already said the prison rules had been correctly applied in that case. Id. at 640.

Secret, on the other hand, directly controls this case. Exhaustion of administrative remedies is required in "prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829. Administrative procedures, to be considered adequate:

> "must be capable of providing the remedy sought by the plaintiff. They must be capable of providing that remedy within a reasonable time so as not to delay unduly the plaintiff's right to file his complaint in federal court. Finally, they must not be so inherently unfair that utilization of them would be futile." Id. at 831.

In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in Secret, id. at 832, and that petitioner has put forward no reasons why it should be considered "inherently unfair," this court cannot say that such an appeal would have been futile.

Plaintiff's complaint is dismissed for failure to exhaust administrative remedies.

ENTER: Bernard M. Decker
United States District Judge

DATED: October 24, 1979.

PROOF OF SERVICE

STATE OF ILLINOIS)
)ss
COUNTY OF C O O K)

MARILOU SULLIVAN, being first duly sworn, on oath deposes and states that she served the following attorney of record at the address listed below by placing three (3) copies of the Respondent's Brief in Opposition in the United States Mail, postage paid, at 160 North LaSalle Street, on October 8, 1980.

MR. DANE LAMAR JENKINS,
BOX 112
Joliet, Illinois 60434

Marilou Sullivan

SUBSCRIBED AND SWORN to
before me this 8th day
of October, 1980.

Maureen McMahon
NOTARY PUBLIC

No. 80-5116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS, *Petitioner,*

v.

LOU BREWER, WARDEN,
DEPARTMENT OF CORRECTIONS, *Respondent.*

On Writ of Certiorari To The United States Court Of Appeals For the Seventh Circuit

---

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1) Whether it was error to dismiss Petitioner's complaint brought under 42 U.S.C. §1983 for failure to exhaust state administrative remedies.

2) Whether the District Court erred by not granting judgment to the Petitioner.*

3) Whether the District Court erred by dismissing Petitioner's complaint prior to hearing or ruling upon his motion for leave to amend and supplement his original complaint.

---

* After review of the record below, it is now Petitioner's position that this question cannot be appropriately decided by this Court since neither the Court of Appeals nor the District Court below addressed the question, no request for judgment was made to the District Court, and the record now contains insufficient information for an adequate determination of the question.

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OPINIONS BELOW

The United States Court of Appeals for the Seventh Circuit issued an unpublished order on June 20, 1980, affirming the decision of the United States District Court for the Northern District of Illinois. It is reproduced in the Joint Appendix at 27-28. The United States District Court for the Northern District Of Illinois issued an unpublished Memorandum Opinion and Order on October 24, 1979, dismissing Petitioner's complaint. It is reproduced in the Joint Appendix at 25-26.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit was issued on June 20, 1980. The Petition for Writ of Certiorari was filed on July 25, 1980. Certiorari was granted on November 10, 1980. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

STATUTES INVOLVED*

Section 1983 of Title 42 of the United States Code.

Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), Section 7.

Illinois Unified Code of Corrections, 3-88; Illinois Rev. Stat. ch. 38, §1003-8-8 (1979).

STATEMENT OF THE CASE

On February 2, 1979, Petitioner Dane Lamar Jenkins was transferred to the Stateville Correctional Center in Illinois. Complaint, at 3 (J.A. 5). On February

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* The pertinent text of the statutes cited is set forth in the Appendix to this Brief.

24, 1979, the Director of the Illinois Department of Corrections declared Stateville Penitentiary in a state of emergency. Lou Brewer, Warden of the Penitentiary, acting pursuant to this declaration, initiated a "lock down" under which all prisoners were temporarily assigned to cells in other houses and all contraband property was to be seized. Motion to Amend Complaint, at 1 (J.A. 21). All property belonging to the prisoners was to be left behind in their original cells. Petition for Certiorari, at 3. A directive from Warden Brewer instructed all prisoners to place non-essential property in shipping boxes to be mailed to their families; all other property was to remain on their beds for inspection. *Id.*

On March 17, 1979, Petitioner was separated from his cell for seven days, *Id.* On his return, Petitioner discovered that all his property was missing. Complaint, at 3 (J.A. 5). Petitioner's property included personal mail, legal correspondence, legal documents and miscellaneous personal property valued at $600.00. Affidavit of Missing Personal Property (J.A. 9-10). No property receipt was issued to the Petitioner in apparent violation of prison regulations. Motion to Amend Complaint, at 2 (J.A. 22).

Petitioner filed a grievance concerning his lost property with the Institutional Inquiry Board, which heard the grievance on April 19, 1979. Stateville Inquiry Board Report (J.A. 11). The Board made the following finding: "The package in question cannot be verified as having left the cellhouse and being in existence. Resident may file in Court of Claims." *Id.* Warden Brewer concurred in this finding. *Id.* Petitioner then filed a second grievance with the Institutional Inquiry Board, to which the Board declined jurisdiction. Petition for Certiorari, at 3-4.

On May 29, 1979, Petitioner filed a complaint in the United States District Court for the Northern District of Illinois under 42 U.S.C. §1983, seeking reimbursement from the persons responsible, including the Warden "for personal property that was taken from me illegally appox. (sic) $600.00 dollars, and for damages suffered as a cause of personal property taken from me illegally (sic) the amount of $10,000 dollars." Complaint, at 4 (J.A. 5).

On August 20, 1979, Petitioner filed a Motion for Leave to Amend and Supplement Plaintiff's Original Complaint, which motion sought to join as defendants the Director of the Illinois Department of Corrections and other prison officials. These officials were alleged to have conspired to deprive him of his property in violation of the due process and equal protection clauses of the United States Constitution. (J.A. 20-23).

On October 24, 1979, the District Court dismissed Petitioner's complaint for failure to exhaust administrative remedies. The District Court opinion did not address Petitioner's Motion for Leave to Amend. Memorandum Opinion and Order, at 2 (J.A. 26). On June 20, 1980, the Court of Appeals for the Seventh Circuit affirmed the dismissal of the complaint also on the ground that Petitioner had failed to exhaust his administrative remedies. Order, at 1 (J.A. 28). On November 10, 1980, this Court granted Petitioner's *pro se* Petition for a Writ of Certiorari. (J.A. 29). On November 17, 1980, counsel was appointed for Petitioner.

SUMMARY OF ARGUMENT

The Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, prohibits federal courts from

requiring prisoners to exhaust administrative remedies before filing suit under 42 U.S.C. §1983, unless it has been determined by the court or the Attorney General that the prison grievance procedure is in substantial compliance with regulations promulgated by the Attorney General. The Act further authorizes a court to continue a prisoner's case for a maximum of ninety days while the prisoner exhausts the prison grievance procedure. Since the District Court decided to dismiss, rather than continue, Petitioner's case and never made the requisite determination of substantial compliance, the decision below must be vacated and the case remanded for further proceedings consistent with the Act. Public L. No. 96-247 applies to Petitioner's case since it was enacted prior to this Court's determination of this appeal.

Even if Pub. L. No. 96-247 were not dispositive of this case reversal of the decisions below is warranted because of reasons of *stare decisis*. This Court has consistently held that exhaustion of administrative remedies is not required in cases under section 1983. Affirmance of the Court of Appeals below would require a direct overruling of these clear and consistent precedents. None of the criteria this Court has previously used to justify direct overruling of precedent apply to this case. Recent expressions of congressional intent support the no-exhaustion rule. The no-exhaustion decisions are not themselves departures from precedents and were decided with clear recognition of the exhaustion issue and its implications. Overruling would frustrate reliance placed on the prior decisions and, finally, the prior decisions correctly construed section 1983.

The language and origins of section 1983 confirm that a requirement of exhaustion of administrative remedies is inconsistent with congressional intent. Such a

requirement would add a jurisdictional limitation to the specific jurisdictional prerequisites that Congress has already established. The application of section 1983 would be thereby rendered highly uncertain since the appropriateness of an exhaustion requirement would become the subject of litigation with respect to each state and local governmental unit in which a section 1983 cause of action would otherwise arise. This Court has consistently refused to read an exhaustion of administrative remedies requirement into the language of the Reconstruction era civil rights laws in the absence of subsequent federal legislation demonstrating Congress's specific intent to require such exhaustion. An exhaustion of administrative remedies requirement would also render section 1983 ineffectual in light of *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), in which this Court held that state statutes of limitations applicable to section 1983 suits are not tolled as a matter of federal law during the period in which plaintiffs exhaust state remedies.

An exhaustion of administrative remedies requirement would be inconsistent with congressional intent in enacting section 1983's predecessor in 1871. Contemporaneous statutes and a contemporaneous statutory construction by this Court demonstrate that Congress did not intend that an exhaustion of administrative remedies requirement be read into the language of section 1983. Such a requirement, moreover, would contradict Congress's motivation in enacting section 1983, which was to provide a federal court remedy because state administrative and judicial remedies were deemed generally inadequate to protect citizens' constitution right.

Even if it were not clear that Congress intended to foreclose judicial imposition of an exhaustion of ad-

ministrative remedies requirement under section 1983, such a requirement would be inconsistent with the exhaustion doctrines' own criteria for determining its applicability. Exhaustion of administrative remedies may not be required unless it is clear that such remedies are consistent with the purposes of Congress's statutory scheme and can provide adequate redress for plaintiff's statutory claim. Administrative remedies are not adequate to fulfill section 1983's three purposes of deterring violations of constitutional rights, providing compensation for the victims of such violations, and upholding the significance of constitutional rights in our society. Administrative agencies are inherently incapable of fulfilling the latter purpose because the independent status of the judicial branch of government gives it a unique role in maintaining the supremacy of the Constitution.

However, even if some administrative remedies could provide an adequate remedy for claims arising under section 1983, the Illinois prison grievance procedure does not provide such a remedy. The Illinois procedure does not meet four of the five standards Congress has established in Pub. L. No. 96-247 for grievance procedures that may be subject to an exhaustion requirement in section 1983 suits. The Illinois procedure, moreover, would be inadequate even if Congress had not already established the minimum standards for adequate grievance procedures since it does not provide any redress for constitutional violations, does not provide a damage remedy, and does not provide procedural safeguards that are necessary for meaningful protection of constitutional rights.

Regardless of the inadequacy of the Illinois grievance procedure in general, exhaustion would have been futile in petitioner's case. The Institutional Inquiry

Board itself recognized this in recommending that Petitioner file in the Illinois Court of Claims rather than pursue the administrative appeal, which was deemed necessary by the District Court below. The Illinois Court Of Claims, however, affords no remedy for claims arising under either section 1983 or the Fourteenth Amendment.

Finally, the District Court's dismissal of Petitioner's case without addressing his Motion For Leave To Amend the Complaint was error both because the record reveals no cause for denial of the Motion and because the Amended Complaint provided further reason why an exhaustion requirement is inappropriate. The Amended Complaint alleged that the Director of Corrections and other prison officials conspired to deprive Petitioner of his property in violation of the fourteenth amendment. Since the grievance procedure is directly controlled by the administrators who Petitioner claims conspired to violate his constitutional rights, that procedure is not impartial and is, therefore, an inadequate remedy for petitioner's constitutional claims.

ARGUMENT

I. Congress's Recent Enactment Of Section 7 Of Pub. L. No. 96-247 Requires That The Court Of Appeals Judgment Affirming The Dismissal Of Petitioner's Complaint For Failure To Exhaust Prison Grievance Procedures Be Vacated.

Regardless of the practical advantages courts may perceive in requiring exhaustion of administrative remedies, courts cannot impose such a requirement in the face of contrary congressional intent. *See Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975). In the Civil Rights of Institutionalized Persons Act of

1980, Pub. L. No. 96-247, 94 Stat. 349 (1980) (hereinafter cited as Pub. L. No. 96-247),[1] Congress prohibited courts from requiring prisoners to exhaust administrative remedies in section 1983[2] suits, except in accordance with the limitations prescribed in section 7 of the Act. The exhaustion requirement imposed below violated those express limitations.

Section 7(a)(1) of Pub. L. No. 96-247 provides that in any prisoner section 1983 action the court shall, if it believes it appropriate and in the interest of justice, continue the case for up to ninety days in order to require exhaustion of available plain, speedy, and effective administrative remedies. Section 7(a)(2) states that such exhaustion "may not be required unless the Attorney General has ceritified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b)." Subsection (b) requires the Attorney General to promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of prisoner grievances.[3]

Public L. No. 96-247 clearly applies to the instant case since its enactment precedes final ruling by this Court. *See Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975); *Bradley* v. *School Board of Richmond*, 416 U.S. 696, 711-12 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 281-82 (1969). The District Court below

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[1] The relevant text is set forth *infra*, at 1a.

[2] 42 U.S.C. 1983 (1976). The text is set forth *infra*, at 1a.

[3] The Attorney General's proposed regulations pursuant to §7(b)(1) are published in 45 Fed. Reg. 79,095-101 (1980) (to be codified in 28 C.F.R. Part 40). Section (b)(2) specifies five specific criteria that must be set forth in these standards.

could not have made the requisite determination of substantial compliance with the Regulations since neither the Act nor the Regulations existed when the court dismissed plaintiff's case for failure to exhaust.[4] Congress's present directive to the court, however, is clear and unavoidable: exhaustion of administrative remedies in a prisoner section 1983 suit may not be required unless the prescribed judicial determination is made.

The District Court's dismissal of plaintiff's complaint for failure to exhaust also requires reversal since section 7(a)(1) authorizes the court to do no more than continue the prisoner's case for ninety days while the prisoner exhausts the available remedies. Although section 7(a)(1) does not specifically prohibit dismissal for failure to exhaust, the fact that it authorizes only a continuance for such failure demonstrates Congress's intent that dismissal not be an allowable sanction for failure to exhaust. This is in accordance with the "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. . . . [This] principle reflects an ancient maxim — *expressio unius est exclusio alterius.*" *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); *see also TVA* v. *Hill*, 437 U.S. 153, 188, (1978).

In sum, affirmance of the Seventh Circuit's decision approving the dismissal of Petitioner's complaint for failure to exhaust administrative remedies would sanction exactly what Congress prohibited when it denied federal

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[4] The date of enactment of Pub. L. No. 96-247, May 23, 1980, preceded the June 20, 1980, ruling below by the Seventh Circuit, but was subsequent to the October 24, 1979 ruling by the District Court below.

courts the authority to require exhaustion except in the manner specified in Pub. L. No. 96-247. The Seventh Circuit's decision should therefore be vacated with directions to remand the case to the District Court for further proceedings consistent with the requirements of Pub. L. No. 96-247.

II. The Principle Of *Stare Decisis* Warrants Reversal Of The Seventh Circuit's Decision Affirming The Dismissal Of Petitioner's Complaint.[5]

A. THE DISMISSAL BELOW DIRECTLY CONTRADICTS CONSISTENT SUPREME COURT HOLDINGS.

This Court has consistently and unequivocally held that exhaustion of administrative remedies is not required under section 1983.[6] These holdings have often been affirmed by this Court's dicta as well.[7] The Court

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[5] It is Petitioner's position that this Court need reach the issues discussed in sections II through IV of this Brief only if it does not find the argument in section I dispositive of the case.

[6] *Carter* v. *Stanton*, 405 U.S. 669 (1972) (per curiam); *Wilwording* v. *Swenson*, 404 U.S. 249 (1971); *Houghton* v. *Shafer*, 392 U.S. 639 (1968) (per curiam); *Damico* v. *California*, 389 U.S. 416 (1967) (per curiam); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).

[7] *Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975) ("Exhaustion of state judicial or administrative remedies in *Steffel* was ruled not to be necessary, for we have long held that an action under §1983 is free of that requirement."); *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974) ("When federal claims are premised on 42 U.S.C. §1983 and 28 U.S.C. §1343(3) - as they are here - we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights."). *See also Wolff* v. *McDonnell*, 418 U.S. 539, 554-55 (1974); *Allee* v. *Medrano*, 416 U.S. 802, 814 (1974); *Preiser* v. *Rodriguez*, 411 U.S. 475, 492-93 n.10, 494 (1973) ("Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies."); *United States ex rel. Ricketts* v. *Lightcap*, 567 F.2d 1226, 1229-33 (3d Cir. 1977).

of Appeals for the Seventh Circuit, however, in *Secret* v. *Brierton*, 548 F.2d 823, 826-27 (7th Cir. 1978), the decision upon which it relies below, maintained that this Court's holdings are limited to the proposition that under section 1983 plaintiffs are not required to exhaust futile remedies. The Seventh Circuit reasoned that the remedies actually at issue in the Court's exhaustion cases were in fact futile and that any broader statement by the Court was therefore merely dictum. *Id.* The language actually used by the Court in these cases, however, demonstrates the exact opposite: the Court rested its decisions on the holding that exhaustion was not required under section 1983; its references to the probable futility of exhaustion were simply observations unnecessary to the decisions.

First, in *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), the Court reversed the dismissal of a section 1983 action for failure to exhaust state administrative remedies. *Id.* at 674. The Court premised this result on the fact that in *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961), it had "previously indicated that relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy." *Id.* at 671. Later in the opinion, the Court introduced its discussion of the probable inadequacy of the state administrative remedy by stating: "[m]oreover, it is by no means clear that Illinois law provides petitioner with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." *Id.* at 674-75. The Court's use of the term "moreover", which is synonymous with "in addition to" or "besides," demonstrates that the discussion of the probable futility of exhaustion was intended only to supplement, and not supplant, the Court's preceding dispositive determination of the lack of any

need to exhaust administrative remedies under section 1983.

Any doubt as to the Court's intent in this regard, however, was removed by the Court's decisions in *Houghton* v. *Shafer*, 392 U.S. 639 (1968) (per curiam) and *Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (per curiam). In *Houghton*, the Court initially observed that "it seems likely that to require petitioner to appeal . . . [to further administrative levels] would be to demand a futile act." *Id.* at 640. The Court then concluded that "[i]n any event, resort to these remedies is unnecessary in light of our decisions in *Monroe* v. *Pape*, 365 U.S. 167, 180-183; *McNeese* v. *Board of Education*, 373 U.S. 668, 671; and *Damico* v. *California*, 389 U.S. 416." *Id.* at 640. If the Court had not intended its reliance on the *Monroe — McNeese — Damico* general no exhaustion rule to be the dispositive holding of the case, it would not have used the term "in any event" in order to show that exhaustion is unnecessary regardless of the adequacy of the available remedies. Finally, the Court in *Wilwording* v. *Swenson, supra*, confirmed conclusively that the discussion of futility in *Houghton* was merely dicta and that the Court's holding was that exhaustion of administrative remedies is not required under section 1983; "[a]lthough the probable futility of such administrative appeals was noted, we held that in 'any event, resort to these remedies is unnecessary.' " *Id.* at 252.

The Seventh Circuit's attempt in *Secret*, 584 F.2d at 827, to dismiss the significance of *Damico* v. *California*, 389 U.S. 416 (1967), on the ground that the administrative remedy in *Damico* would likely have been futile, is also unpersuasive. There is nothing whatever in the Court's opinion in *Damico* to indicate that it even considered futility as an additional reason for not requir-

ing exhaustion of administrative remedies. Similarly, *Secret's* attempt to dismiss the significance of *Wilwording's* general no-exhaustion rule as being limited to exhaustion of judicial remedies must also fail since *Wilwording* both is not so limited and refers specifically to exhaustion of administrative remedies when it relies on *Houghton*. *Wilwording*, 404 U.S. at 252. Finally, the Seventh Circuit's attempt to qualify the Supreme Court's rule that exhaustion of administrative remedies is not required under section 1983 is undermined even further by the fact that it cannot, and does not attempt to, dismiss the relevance of *Carter* v. *Stanton*, 405 U.S. 669 (1972), and *Metcalf* v. *Swank*, 406 U.S. 914 (1972), in which cases the Court applied without qualification the no-administrative-exhaustion rule in the context of section 1983 challenges to welfare regulations.[8]

Thus, in light of the Court's holdings in *McNeese*, *Damico*, *Houghton*, and *Wilwording* and the Court's

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[8] The Seventh Circuit in *Secret* attempts to find in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), support for its departure from the holdings of *McNeese, Damico, Houghton*, and *Wilwording*. *Secret*, 548 F.2d at 828. However, the Court in *Gibson* both cites as valid authority its no-administrative-exhaustion holdings in *McNeese* and *Damico* and raises the possibility of an alternative holding only "where the individual charged is to be deprived of nothing until the completion of that proceeding. . . ." *Gibson* v. *Berryhill*, 411 U.S. at 574-75. Thus, the possible exception to which *Gibson* alludes fits within well-established principles of ripeness and has no application where, as in the instant case, compensation for a past deprivation of constitutional rights is sought. *See McCray* v. *Burrell*, 516 F.2d 357, 364 (4th Cir. 1975), *cert. dismissed as improvidently granted*, 426 U.S. 471 1976). Moreover any implication of a broader exception to the exhaustion doctrine as a result of *Gibson* fails in light of the Court's subsequent reaffirmance of its general rule barring an administrative exhaustion requirement under section 1983 in *Ellis* v. *Dyson*, 421 U.S. 426, 432-33 (1975), *Wolff* v. *McDonnell*, 418 U.S. 539, 554-555 (1974), and *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974).

repeated characterization of its holdings in those cases, *supra* note 7, at 10, the Seventh Circuit's contention that the Court has not clearly and unequivocally held that exhaustion of administrative remedies is not required under section 1983, is untenable[9] An affirmance of the Court's holding below, requiring Petitioner to exhaust administrative remedies under section 1983, would thus require a direct overruling of the Court's contrary holding. For the reasons stated in Parts II B and III, *infra,* at 14-33, such an overruling would be unwarranted under all of the factors the Court has previously used in determining whether the values underlying the principle of *stare decisis* are outweighed by the need to reject prior controlling authority.

B. THIS CASE PRESENTS NO JUSTIFICATION FOR DEPARTING FROM THE PRINCIPLE OF *STARE DECISIS.*

Citing the principle of *stare decisis*, the Court has expressed reluctance to overrule its prior holdings simply because different rulings might currently seem more appealing. *See Runyon* v. *McCrary*, 427 U.S. 160, 174-75 & n.12 (1976). *See also Monell* v. *Department of Social Services of New York*, 436 U.S. 658, 714-19 (1978) (Rehnquist, J., dissenting). This reluctance is particularly

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[9] Even if the Court's discussion in these cases of the futility of exhaustion were to be deemed holdings rather than dicta, the Seventh Circuit would be incorrect in disregarding as dicta the Court's conclusions that exhaustion is not required under section 1983. Such conclusions are, at the least, independent grounds of the decisions and as such cannot be deemed dicta simply because a reader prefers the alternative grounds. *See United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) ("for where there are two grounds upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other.' "). *See also Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

strong is cases involving statutory analysis because of Congress's ability to correct through legislation what it might find to be judicial misinterpretation of its true intent. *See Edelman* v. *Jordan*, 415 U.S. 651, 671 & n.14 (1974); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736-37 (1977). The burden that must be met to justify overruling prior holdings construing civil rights legislation was recently analyzed fully in *Monell* v. *Department of Social Services of New York*, 436 U.S. at 695-701. The Court and the separate opinion writers set forth five factors that may be used to justify such overruling.[10] None of these factors now justify overruling the Court's above discussed repeated holdings that exhaustion of administrative remedies is unnecessary under section 1983.

First, recent expressions of congressional intent demonstrate Congress's knowledge of and agreement with the Court's prior holdings rejecting an administrative exhaustion requirement under section 1983. Even if the enactment of Pub. L. No. 96-247 were not in itself dispositive of this case, *see* Part I *supra*, the legislative history of the limited exhaustion requirement of that Act demonstrats conclusively that Congress knew of and agreed with the Court's rejection of an administrative exhaustion requirement for section 1983

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[10] These factors are: first, whether overruling would contradict congressional intent, 436 U.S. at 696-99; second, whether the prior holdings in question were themselves a departure from prior holdings, *id.* at 695-96; third, whether overruling would frustrate a party's legitimate reliance placed on the prior holdings, *id.* at 699-700; fourth, whether the issues in question were fully argued in and addressed by the prior cases, *id* at 709 (Powell, J., concurring); and fifth, whether the prior holdings had misconstrued the statute's meaning, *id.* at 700-01. With respect to the last factor, the Court did not decide whether the prior holdings had to appear wrong "beyond doubt," as advocated in Justice Rehnquist's dissent, *id.* at 715, but found such test to have been satisfied in any event. *Id.* at 700-01.

cases, except under the particular conditions specified in the Act.[11] Such explicit congressional acquiescence in prior holdings is a powerful reason to accord such holdings *stare decisis* effect. *See Runyon* v. *McCrary*, 427 U.S. 160, 173-75 (1976). Moreover, the simple fact of congressional inaction during the seventeen years since the Court first specified in *McNeese* its no administrative exhaustion rule is additional reason not to overrule the

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[11] *See* 124 Cong. Rec. H 7481 (daily ed. July 28, 1978) (remarks of Rep. Wiggins with regard to H.R. 9400, a predecessor to Pub. L. No. 96-247). Rep. Wiggins stated:

> Mr. Chairman, it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action. For many years, some of us have felt that the requirement of exhaustion of remedies would be a desirable in the case of 1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement.

Id. Rep. Ertel further stated:

> At the present time under 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal Court must take jurisdiction of that action under 1983.

Id. at H 4624.

See also Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st and 2d Sess. 20 (1977-78) (Testimony of Hon. Drew S. Days III, Asst. Attn. Gen., Civil Rights Division, U.S. Department of Justice.):

> We have given some thought to that issue, needless to say. And I think it is important to understand something about the background of exhaustion requirements insofar as section 1983 of 42 U.S. Code is concerned.
>
> The Supreme Court has repeatedly declined to require that a plaintiff in a section 1983 action exhaust State remedies, either judicial or administrative. The basis for that position taken by the Supreme Court is articulated in a case called the *McNeese* case. . . .

Id.

Court's holdings in this regard. *See Flood* v. *Kuhn*, 407 U.S. 258, 269-85 (1972).

Second, unlike the situation in *Monell*, 436 U.S. at 695-96, overruling is here unwarranted because the prior holdings now at issue were not departures from prior practice. Before *Monroe* and *McNeese* the Court had never addressed the question of whether exhaustion of state administrative remedies was required under section 1983.

Third, the Court's no-exhaustion holdings constitute a clear and uncontradicted line of precedent that was decided with an obvious recognition of their implications, as is demonstrated both by Justice Harlan's dissent in *Damico* v. *California*, 389 U.S. at 417-20, and by the briefs filed in that case. Where there are such explicit, consistent, and fully discussed holdings on a question of statutory construction, principles of *stare decisis* apply most strongly. *See also Maine* v. *Thiboutot*, 100 S.Ct. 2502, 2517-19 (1980) (Powell, J., dissenting); *Monell*, 436 U.S. at 708-09 (Powell, J., concurring).

Fourth, to overrule the Court's holdings rejecting an administrative exhaustion requirement would frustrate the reliance placed on such holdings by plaintiffs, such as the Petitioner, who are likely to have foregone the available state administrative remedies because of the direct federal court remedy which the Supreme Court has consistently held open to them.[12] *See Monell*, 436 U.S. at 699-700.

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[12] This consideration would also warrant that should this Court reject all of Petitioner's arguments and find an exhaustion of administrative remedies requirement under section 1983, such requirement be imposed prospectively. *See Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-09 (1971).

Finally, *stare decisis* effect should be accorded the Court's prior decisions rejecting an exhaustion of administrative remedies requirement under section 1983 because it is "not beyond doubt" that such decisions misconstrued the meaning of section 1983. *See supra* note 10, at 15. Indeed, as discussed in Part III, *infra*, such decisions are clearly correct in their construction of the statute.

III. Requiring Plaintiffs To Exhaust Administrative Remedies Before Filing Suit Under Section 1983 Would Frustrate Congress's Intent In Creating And Maintaining An Independent Federal Remedy For The Vindication Of Constitutional Rights.

The Court has consistently emphasized that the Reconstruction civil rights statutes must be given the meaning dictated by their "origins and their language." *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Maine* v. *Thiboutot*, 100 S.Ct. at 2509 (Powell, J., dissenting); *see also Owen* v. *City of Independence*, 445 U.S. 622, 635-37 (1980). The historical context in which section 1983 was enacted confirms what the expansive sweep of the statutory language clearly commands: courts cannot interject a requirement of exhaustion of state remedies to delay or deny the independent right of action in federal court that Congress gave plaintiffs under section 1983.[13]

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[13] Since for present purposes there are no determinative differences in the language of the present 42 U.S.C. §1983 and of its predecessor, Section 1 of the Civil Rights Act of 1871, reference to section 1983 herein includes reference to the provisions of the original Act.

A. AN EXHAUSTION OF STATE REMEDIES REQUIREMENT WOULD CONTRADICT THE LANGUAGE OF SECTION 1983.

It is not necessary to look beyond the words of section 1983, *infra*, at 1a, to reject an exhaustion of administrative remedies requirement since the plain language of the statute, supported by consistent judicial interpretation, makes such a requirement impermissible. *See Maine* v. *Thiboutot*, 100 S.Ct. at 2505 n.4. Requiring a plaintiff to exhaust administrative remedies before being able to file suit under section 1983 would legislate a condition for seeking relief that is inconsistent with the terms of the Act:

> By the plain terms of §1983, two — *and only two* — allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *See Monroe* v. *Pape*, 365 U.S. 167, 171 (1961).

Gomez v. *Toledo*, 100 S.Ct. 1920, 1923 (1980) (emphasis added). Had Congress intended an exhaustion requirement as an additional condition for seeking relief under section 1983, it could have easily so specified, as Congress has frequently done in regard to other civil rights legislation.[14] Indeed, when Congress did wish a limited

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[14] *See, e.g.*, Title VII of the Civil Rights Act of 1964, (42 U.S.C. §2000 *et seq.* (1976 & Supp. 1979); The Federal Habeas Corpus Statute, 28 U.S.C. §2254 (1976); *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973) (In *Preiser* the Court justified its prior cases refusing to require exhaustion of administrative remedies under section 1983 on the ground that "in those cases brought pursuant to §1983, no other, more specific federal statute was involved that might have reflected a different congressional intent." *Id.* at 492 n.10.); *see also Allen* v. *McCurry*, 49 U.S.L.W. 4015, 4019 n.24 (Dec. 9, 1980) ("Under the modern statute, federal habeas corpus is bounded by a

exhaustion requirement under section 1983, it expressed such intent explicitly in Pub. L. No. 96-247. *See* Part I *supra*.

Petitioner does not contend, however, that the adequacy of state remedies may never limit the relief to which plaintiffs are entitled in suits brought under section 1983. Under certain circumstances a plaintiff might be required to allege the inadequacy of state remedies as an element of his claim of a deprivation of due process of law. *See, e.g., Ingraham* v. *Wright*, 430 U.S. 651, 670-79 (1977). *See also Bonner* v. *Coughlin*, 517 F.2d 1311, 1319-20 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). Unlike the due process clause, however, the language of section 1983 is not so vague that it might warrant importation of a requirement of showing inadequate state remedies in order to provide substantive content to its terms. To the contrary, reading such a requirement into the language of section 1983 would convert its clear and specific jurisdictional prerequisites, *see Gomez* v. *Toledo*, *supra*, at 19-20, into a statute the coverage of which would be indeterminant on its face. Only through individualized adjudication of the adequacy of the administrative remedies actually available in each case could it then be determined whether any plaintiff has a direct right of action under section 1983. It may be that exhaustion of certain administrative remedies is required under section 1983 where the alleged violation is also the subject of a comprehensive enforcement scheme under a separate federal statute. *See Chapman* v. *Houston*

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requirement of exhaustion of state remedies and by special procedural rules . . . which have no counterparts in §1983, and which therefore demonstrate the continuing illogic of treating federal habeas and §1983 suits as fungible remedies for constitutional violations.").

Welfare Rights Organization, 441 U.S. 600, 673 n.2 (1979) (Stewart, J., dissenting). However, an exhaustion requirement that would depend upon a determination of the adequacy of the administrative remedies in each of the countless governmental units in which section 1983 suits might be brought would have no justification in the language of any federal statute[15] and would leave courts and litigants guessing in each case whether section 1983 affords a direct right of action.

The uncertainty and added litigation burden that would result from importing an exhaustion of administrative remedies requirement into the language of section 1983 would probably not be offset by the possible reduction in the number of section 1983 suits resulting from such a requirement.[16] However, even if

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[15] As noted *supra*, at 10, this argument applies only if Pub. L. No. 96-247 is not deemed dispositive of this case. The exhaustion requirement in Pub. L. No. 96-247 demonstrates, however, the manner in which Congress can narrowly define the limitations on a requirement of exhaustion of state administrative remedies so that its application is precisely ascertainable and the protection afforded by the statute is not eviscerated by state statutes of limitations. *See* discussion of *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790 (1980), *infra*, at 23-24.

[16] Furthermore, the burden on federal courts from such suits may not be as severe as is sometimes asserted. According to one recent study of the question:

> The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get under way, because prisoner cases are not particularly complex as compared to other types of federal litigation.

Turner, *When Prisoners Sue: A Study Of Prisoner Section 1983 Suits In The Federal Courts*, 92 Harv. L. Rev. 610, 637 (1979). Moreover, as this study also points out, an exhaustion requirement might even increase the number of suits: "Indeed, it is possible that

efficiency and convenience would be promoted by such a requirement, courts may not on these grounds disregard the prerequisites Congress has, and has not, stipulated for stating a cause of action in federal court. In diversity actions the Court has rigorously applied the principle that Congress's choice of forum must be respected regardless of courts' desire to promote efficiency and convenience by shifting cases to state forums. *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 344 (1976). This principle is even more central to the implementation of congressional intent under the broadly remedial Reconstruction era civil rights laws. As the Court pointed out in *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967): "[i]n thus expanding federal judicial power [by enacting the five civil rights acts between 1866 and 1875], Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims."

In recognition of Congress's intent to give plaintiffs a full and independent remedy under these Reconstruction era civil rights laws the Court in a recent series of cases has refused to attach an exhaustion requirement to such laws in the absence of a clear manifestation of contrary congressional intent. In *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 461 (1975), the Court explicitly recognized the practical advantages that would follow from requiring exhaustion of the requisite administrative procedures under Title VII before allowing plaintiffs to file suit under 42 U.S.C. §1981. This Court, however, rejected an exhaustion requirement because it

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the introduction of a grievance mechanism could increase the number of suits by educating prisoners to make formal complaints, guiding them to articulate inchoate grievances and insist on their adjudication." *Id.* at 634-35 (footnote omitted).

found that Congress had provided independent avenues of relief under the two acts. The practical disadvantages from allowing the filing of a section 1981 action without exhaustion of Title VII administrative machinery, this Court found "are the natural effects of the choice Congress had made available to the claimant by its confering upon him independent administrative and judicial remedies." 421 U.S. at 461. The Court also pointed out that in granting claimants a choice of forum, Congress has given them a valuable right since "under some circumstances, the administrative route may be highly preferred over the litigatory; under others the reverse may be true." *Id. See also Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974).[17]

Applying the *Johnson* rationale to the relationship between section 1983 and a state remedial scheme, the Court in *Board of Regents* v. *Tomanio*, 100 S.Ct. 1790, 1795-96 (1980), held that the statute of limitations applicable to section 1983 actions in New York cannot be

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[17] Congress has recently granted complainants a similar choice between administrative and judicial remedies in creating an administrative procedure to process complaints concerning Title I of the Elementary and Secondary Education Act. Education Amendments of 1978, 20 U.S.C. §2738 (Supp. 1979). The Senate Report is emphatic that this complaint resolution procedure is not to be deemed a limitation upon complainants' direct right of access to federal court, presumably through section 1983:

> However, the committee wishes to emphasize that these amendments prescribing a complaint resolution process at all three levels should not be construed to prohibit a beneficiary of title I or his representative from bringing a private suit in District Court without first exhausting such administrative procedures. It is particularly important that immediate access to the courts be available where beneficiaries allege that a State or federal policy is inconsistent with title I or that the alleged violations are systemic.

S. Rep. No. 856, 95th Cong., 2d. Sess. 31 (1978).

tolled by reading an exhaustion of state remedies requirement into section 1983:

> The District Court's conclusion that state remedies should be utilized before resort to the federal courts may be an entirely sound and sensible observation, but in our opinion it does not square with what must be presumed to be congressional intent in creating an independent federal remedy.

Id. at 1798. Given *Tomanio's* holding that Congress did not intend to hold open a cause of action under section 1983 while plaintiffs attempt to exhaust state remedies, to require plaintiffs now to exhaust such remedies before suing under section 1983 would render that statute an empty shell, something this Court has heretofore repeatedly refused to do.

B. AN EXHAUSTION OF STATE REMEDIES REQUIREMENT WOULD CONTRADICT CONGRESS'S INTENT IN ENACTING SECTION 1983.

The Court has been willing to read certain limitations into the expansive language of section 1983 where such limitations, such as judicial immunity from damages, were so firmly rooted in the common law as of 1871 and were so firmly supported by policy reasons that Congress would have expressly negated such limitations had it wished them not to be read into section 1983. *See Owen* v. *City of Independence*, 445 U.S. at 637. An exhaustion of state administrative remedies requirement, however, cannot similarly be read into the language of section 1983. Both the common law in 1871 and the policies motivating congressional enactment of section 1983 establish that Congress has never intended exhaustion of administrative remedies to be a prerequisite for filing a federal court action under section 1983.

Not only was the exhaustion of administrative remedies doctrine a development of a later period,[18] but this Court, several months after the enactment of section 1983, specifically rejected an argument for reading such a requirement into a statute that was similar in format to section 1983.[19] In *Clyde* v. *United States*, 80 U.S. (13 Wall.) 38 (1871), the Court of Claims had dismissed a petition for compensation on the ground that the claimant had not followed the Court of Claim's rule of practice requiring claimants to show that they had first unsuccessfully sought relief from the executive department which might have entertained their claims. This Court reversed the dismissal, holding that the Court of Claim's rule was a restriction on that Court's jurisdiction that was not required by the Act creating the Court of Claims. The Act required that the Court of Claims "shall 'hear and determine all claims found upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." *Id.* at 39. "However useful and proper" the Court of Claim's rule was, this Court held that "it was not competent for the Court of Claims to impose it as a condition of presenting a claim in that court," and that such a rule "was established a jurisdictional requirement which Congress alone had power to establish." *Id.*

In addition, if Congress in 1871 had wanted the federal courts to give any consideration at all to prior administrative determinations relevant to plaintiffs'

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[18] *See* Burger, *Exhaustion of Administrative Remedies*, 48 Yale L.J. 981, 981 (1939) ("The earliest manifestation of the exhaustion doctrine is found in *Dundee Mortgage Trust Inv. Co.* v. *Charlton*, 32 Fed. 192 (C.C.D. Ore. 1887).")

[19] 15 Stat. 76 (1868).

claims under section 1983, it could have so specified, as it had done three years previously in regard to actions in the Court of Claims. As the Court in *Clyde* noted, Congress had provided in 1868 that an executive department that had decided a claim against it must furnish to the Attorney General "such facts, circumstances and evidence as it might be in possession of in relation to any claim prosecuted in the court of claims. . . ." *Clyde*, 80 U.S. at 39 (referring to An Act to provide for Appeals from the Court of Claims, and for other Purposes, 15 Stat. 76 (1868)). Similarly, if Congress had intended that a federal right of action under section 1983 be limited to those persons who had failed to obtain redress from state administrative remedies, it could have adopted a provision similar in format to that enacted in 1866 which limited the provision of a federal forum to "persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality" rights secured by section 1 of the 1866 Act.[20]

An exhaustion of administrative remedies requirement was in 1871 contrary not only to contemporaneous principles of statutory construction, but also to Congress's motivation in enacting section 1983. As this Court established in *Monroe* v. *Pape*, 365 U.S. at 173-74 (1961), Congress intended through section 1983 to provide a federal remedy because of state laws that were unconstitutional and because of state remedies that were inadequate either in theory or in practice. One of the central questions in *Monroe* was whether section 1983's "under color of" state law requirement made it necessary to establish that the available state law remedies in fact sanctioned the otherwise unauthorized unconstitutional conduct of state officials, as this Court

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[20] Act of April 9, 1866, ch. 31 section 3, 14 Stat. 27.

had previously indicated in the *Civil Rights Cases*, 109 U.S. 3, 17 (1883). *Monroe*, 365 U.S. at 172. In holding that no such showing was necessary to establish action "under color of" state law, the Court did not distinguish between administrative and judicial remedies, but stated only that "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183.

This Court's subsequent refusal to require exhaustion of state administrative, as well as judicial, remedies under section 1983[21] follows logically from the Court's holding in *Monroe* that section 1983's "under color of" state law requirement mandates no more than a showing of an official's unauthorized misuse of state-conferred authority, and not a showing of the approval of such misuse of authority by the processes of state law. If Congress had thus intended the "under color of" law requirement to be satisfied by unauthorized official conduct where state judicial remedies are not exhausted, it would have been the most bizarre statutory draftsmanship if Congress had intended that state administrative remedies must be exhausted in order to meet that same "under color of" law requirement. Moreover, any distinction between judicial and administrative remedies for purposes of satisfying the "under color of" law requirement cannot be presumed from the historical context of section 1983's enactment. Congress in 1871 clearly did not deem state administrative processes an appropriate means to accomplish the Act's central purpose — "to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States. . . ." 17 Stat. 13 (1871) (discussed in *Monroe*, 365 U.S. at 171). Rather, Congress, then as now, considered courts the ap-

[21] *See* cases cited Part II A, *supra*, at 10, n.6.

propriate forum for the vindication of constitutional rights. *See infra* note 23, at 29 and accompanying discussion.

Finally and perhaps most importantly, a requirement of exhaustion of state administrative remedies under section 1983 cannot be reconciled with Congress's overriding purpose in enacting section 1983, which the Court has defined as "offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum* v. *Foster*, 407 U.S. 225, 239 (1972). (footnote omitted). Congress's intent to provide a federal remedy that superseded the remedies offered by state law was not unprecedented in 1871. This Court in 1842 had confirmed Congress's authority to provide a federal remedy to insure slaveholders' rights to the unhindered possession of their slaves in whatever states their slaves might be found. *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The Court in *Prigg* was explicit that the federal remedy superseded whatever remedies might be provided under state law. *Id.* at 623-25. Relying in part on the authority of *Prigg*,[22] Congress in a similar fashion through the Reconstruction era civil rights laws clearly established "the role of the Federal Government as a guarantor of basic civil rights against state power . . . ," *Mitchum*, 407 U.S. at 239, and transformed the federal courts into " 'the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.' " *Zwickler* v. *Koota*, 389 U.S. 241, 247 (1967) (quoting Frankfurter & Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System*

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[22] *See Monell* v. *Department of Social Services of New York*, 436 U.S. at 677.

65).[23] It would thus be incongruous, to say the least, to interpose an exhaustion of state administrative remedies requirement as a prerequisite for federal relief when it was Congress's belief in the total inadequacy of state remedies that motivated Congress's creation of the federal remedy in the first place.

In sum, an exhaustion of administrative remedies requirement can be reconciled with neither the language of section 1983, with the common law background in 1871, nor with the goals of the Congress that enacted the legislation.

C. THE CRITERIA FOR THE JUDICIAL IMPOSITION OF AN EXHAUSTION OF ADMINISTRATIVE REMEDIES REQUIREMENT CANNOT BE RECONCILED WITH THE PURPOSES OF SECTION 1983.

Petitioner has argued in Part III A and B, *supra*, that the language and origins of section 1983 make clear that Congress intended the federal remedy to be "separate and independent" of state administrative remedies and therefore did not intend that suits under section 1983 be denied or delayed by the requirement of

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[23] *See also* Cong. Globe, 42d Cong., 1st Sess. 653 (1871) (remarks of Rep. Osborn, ("The question now is, what is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts."). Representative Coburn stated:

> Obviously the court of justice is the first instrument to be used in aid of the fourteenth amendment; safer, milder, surer, more in accordance with reason, with our system, and with public sentiment. Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard.

Id. at 459.

exhausting such remedies. *See Board of Regents* v. *Tomanio,* 100 S. Ct. 1790, 1798 (1980), and accompanying text, *supra,* at 23-24. However, even if this Court concludes that Congress did not positively foreclose the courts from imposing an exhaustion of administrative remedies requirement on suits brought under section 1983, it would still be inappropriate for courts to impose such a requirement since the criteria for judicial application of the exhaustion doctrine are inconsistent with the statutory scheme Congress created in section 1983 for the protection of constitutional rights.

The criteria for judicially imposing an exhaustion of administrative remedies requirement on a federal statutory scheme are not subject to precise formulation. The general rule is that exhaustion is required "[w]here Congress has clearly commanded that administrative judgment be taken initially or exclusively. . . ." *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767 (1947), or "where a claim is congnizable in the first instance by an administrative agency alone. . . ." *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 63 (1956). This Court has also observed that exhaustion is not necessarily "inappropriate when fashioned by judicial decision rather than specific congressional command." *McGee* v. *United States,* 402 U.S. 479, 484 n.6 (1971).[24]

This Court's decisions leave no doubt, however, that an exhaustion requirement must advance the general

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[24] *But see McKart* v. *United States*, 395 U.S. 185, 206-07 (1969) (White, J., concurring.) ("Undoubtedly Congress could require such exhaustion as a prerequisite to judicial review . . . , but Congress has not chosen to do so. In the absence of any such requirement I do not think review of petitioner's classification is an impermissible encroachment upon the bailiwick of the Selective Service System.") (footnote and citation omitted).

purposes of the statutory scheme Congress has designed. *See McGee* v. *United States,* 402 U.S. 479, 484 n.6 (1971) ("The whole rationale of the exhaustion doctrine in the present context lies in purposes intimately related to the autonomy and proper functioning of the particular administrative system Congress has constructed.") Where administrative procedures are not clearly adequate to provide the claimant with the relief Congress intended to make available under the statute, the courts will not impose an exhaustion requirement. *See Gibson* v. *Berryhill,* 411 U.S. 564, 575 n.14 (1973); *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196, 210 (1945); Jaffee, *Judicial Control of Administrative Action,* 426, 432 (1965) ("The exhaustion rule comes into effect only if the remedy — whether administrative or judicial does not matter — is adequate to protect the asserted claim. . . . [I]mmediate relief should be given if the court is unable to give firm assurance of adequate relief once the administrative process is complete.")

This Court has described the relief section 1983 affords as incorporating three essential elements. The first two are the "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson* v. *Wegmann,* 436 U.S. 584, 590-91 (1978). *See also Owen* v. *City of Independence,* 445 U.S. at 651. ("Moreover, §1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Id.*). The third component of section 1983 relief is that of preserving the significance that constitutional rights have in our society. *See, e.g., Carey* v. *Piphus,* 435 U.S. 247, 266 (1978) ("By making the deprivation of such rights ["certain 'absolute' rights that

have not caused actual injury"] actionable for nominal damages without proof of actual injury, the law recognizes the importance of organized society that those rights be scrupulously observed. . . .").

No state administrative procedure that we have found purports to offer anything approaching the scope of protection for constitutional rights that Congress intended to make available through the federal courts under section 1983. As this Court has recently pointed out in *Carlson* v. *Green*, 100 S.Ct. 1468, 1473-74 (1980), elements of an effective deterrent and compensatory remedy for constitutional violations include a damage remedy directly against public officials, a punitive damage remedy, and a jury trial. Since these protections are generally considered uniquely characteristic of the judicial remedy in our legal system, it is not surprising that they are invariably absent from state and local administrative remedial schemes.

It is, of course, conceivable that administrative procedures might be designed to offer these safeguards as well as others that are afforded by the federal courts under section 1983. Even if such administrative remedies could then provide compensatory and deterrant relief for constitutional violations comparable to that afforded by federal courts, an exhaustion requirement would nevertheless be unwarranted since such administrative remedies would still be incapable of accomplishing the third goal of section 1983 — providing societal recognition of the importance of observing constitutional rights. Fulfilling this goal may be the only function of federal courts in certain types of suits under section 1983. *See, e.g.*, *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978). Even in the typical section 1983 case, however, where compensation and deterrence are the primary goals, the function

of upholding the societal efficacy of constitutional rights is an important aspect of the courts' congressionally assigned role of vindicating constitutional rights. Even the most effective administrative agencies are incapable of fulfilling this role since "the judiciary is clearly discernible as the primary means through which these (constitutional) rights may be enforced." *Davis* v. *Passman*, 442 U.S. 228, 241 (1979). To allow administrative agencies even temporarily to displace the federal judiciary as the vindicator of constitutional rights would be a significant departure from the judiciary's traditional role of maintaining the supremacy of the Constitutional against the contrary tendencies of the other branches of government. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

The role of the federal judiciary in our governmental system would thus be substantially diminished if, through the doctrine of exhaustion of administrative remedies, state agencies were to be treated as equally effective guarantors of the constitutional rights that those agencies have been accused of violating. Any such significant alteration of the role of the three branches of government in providing affirmative protection for constitutional rights should not be made in the absence of clear direction from Congress.

IV. Even If This Court Were To Create An Exhaustion Of Administrative Remedies Requirement For Certain Cases Brought Under Section 1983, Such A Requirement Would Be Inapproriate Here Because Of The Inadequacy Of The Illinois Prison Grievance Procedure.

A. PETITIONER SHOULD NOT BE REQUIRED TO EXHAUST THE ILLINOIS PRISON GRIEVANCE PROCEDURE SINCE SUCH PROCEDURE DOES NOT SATISFY CONGRESS'S MINIMUM STANDARDS FOR PROCEDURES THAT ARE SUBJECT TO AN EXHAUSTION REQUIREMENT.

Normally, the determination of whether administrative remedies are sufficiently adequate to require exhaustion can be made only through a case-by-case analysis of the nature of plaintiff's claim, the nature of the administrative remedies actually available and the purposes of Congress's statutory scheme. No such analysis is necessary here, however, since in section 7(b)(2) of Pub. L. No. 96-247, *see infra,* at 1a-2a, Congress has determined the minimum standards of adequancy that a prison grievance procedure must meet if exhaustion is to be required in a section 1983 suit. There was no evidence adduced below to show that the Illinois grievance procedure met the standards of the Act. Moreover, the regulations setting forth the Illinois grievance procedure, *see* J.A. 16-19, are facially inconsistent with all but one of the standards of the Act.

First, the regulations have no provision to meet section 7(b)(2)(A)'s requirement of "an advisory role for employees and inmates . . . (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system." Second, although sections II F and G of the Illinois regulations

provide for maximum time limits for responses to prisoner grievances by the Institutional Inquiry Board and by the Chief Administrative Officer of the Institution, J.A. 17, no time limits are set for responses at the level of the Director of Corrections and the Administrative Review Board. This omission contravenes Pub. L. No. 96-247's requirement of maximum time limits for replies "at each decision level within the system." Section 7(b)(2)(B).

Third, the Illinois grievance procedure includes no provision "for priority processing of grievances which are of an emergency nature," as required by section 7(b)(2)(C). Fourth, although the Illinois procedure in Section II P does prohibit "any disciplinary action" being taken against inmates for using the grievance procedure, J.A. 19, it does not provide assurance against other forms of retailiation. Pub. L. No. 96-247's requirement of "safeguards to avoid reprisals" in section 7(b)(2)(D) encompasses broader protection than merely preventing formal disciplinary action. The Proposed Regulations under the Act make this point explicit by defining "reprisal" as including "any action or threat of action" and requiring written assurance that participation in the grievance procedure will not result in "formal or informal reprisals." 45 Fed. Reg. 79,097 (1980) (to be codified in 40 C.F.R. §40.9).

Finally, section 7(b)(2)(E) provides "for independent review of the disposition of grievances . . . by a person or other entity not under the direct supervision or direct control of the institution." Whether the Illinois procedure, which provides for appeals of grievances to the Director of Corrections, is adequate to meet this standard will depend upon the Attorney General's clarification in his final Rules of the scope of the review intended.

Section 40.7(f) of the Proposed Rules indicates that the Illinois procedure is inadequate since that section requires that review be provided specifically for grievances relative to reprisals and "the substance or general application of policy." Regardless of what the final Rules of the Attorney General will specify, however, it is clear that the Illinois grievance procedure does not satisfy four of the five minimum standards Congress has required for prison grievance procedures that may be subject to an exhaustion requirement in section 1983 suits.

Public L. No. 96-247 also provides that if a court is to continue a prisoner section 1983 case for the purpose of exhausting administrative remedies it shall be "in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available." Section 7(a)(1). No evidence of any kind was introduced below concerning whether the Illinois grievance procedure was "effective." There is no indication that such procedure has ever resulted in the favorable resolution of even one prisoner grievance. Since Pub. L. No. 96-247 now requires some showing that the procedures required to be exhausted are "effective," a remand would be necessary in order to make such a determination. Moreover, since Pub. L. No. 96-247's effectiveness requirement is similar to the common law rule requiring exhaustion of only adequate administrative remedies, *see supra*, at 31-32, it was error for the District Court to dismiss Petitioner's complaint for failure to exhaust administrative remedies without any evidence or affording an opportunity to present evidence as to the adequacy of the Illinois grievance procedures. A remand for the determination of the effectiveness or adequacy of the Illinois procedures is not necessary, however, since, not only are such procedures inadequate as a matter of law in light of section 7(b)(2) A through (D), *see supra*, at

34-35, but they are also inadequate since they are deficient in the basic safeguards that are essential to provide meaningful administrative protection of prisoners' constitutional rights. *See* Part IV B *infra*.

B. BECAUSE THE ILLINOIS PRISON GRIEVANCE PROCEDURE IS INADEQUATE TO PROTECT PETITIONER'S CONSTITUTIONAL RIGHTS, IT WAS ERROR TO DISMISS PETITIONER'S COMPLAINT FOR FAILURE TO EXHAUST SUCH REMEDIES.

Petitioner has maintained that administrative remedies are inadequate to provide relief for claims assertable under section 1983 not only because of their inherent inability to provide legitimate societal vindication of constitutional rights but also because of their inability to provide practical protection for the exercise of such rights. *See* Part III C, *supra*, at 31-33. The Illinois prison grievance procedure provides a concrete, although perhaps extreme, example of an administrative remedial scheme that fails to provide even minimal practical protection for constitutional rights.[24]

The most serious deficiency of the Illinois grievance procedure is its failure to specify either its subject matter jurisdiction or the relief it makes available. The Illinois statute mandating a prison grievance procedure specifies the scope of its jurisdiction by stating only that the pro-

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[24] Although as noted *supra*, at 32-33, it is conceivable that administrative remedies might be formally constructed to mirror the protections afforded constitutional rights in the federal courts under section 1983, the Illinois procedures are not aberrant in their failure to afford minimally adequate protection for prisoners' constitutional rights. *See* Comment, *State Prisoners and the Exhaustion of Administrative Remedies: Section 1983 Jurisdication and the Availability of Adequate State Remedies,* 7 Seton Hall L. Rev. 366, 403-09 (1976).

cedure shall be established "to review the grievances of committed persons." Ill. Rev. Stat. ch. 38, §1003-8-8(a) (1979), *infra*, at 3a. The Illinois Department of Corrections Regulation implementing the grievance procedure does not further clarify its jurisdiction in stating that its purpose is to "air and seek resolution to complaints, problems and grievances. . . ." Illinois Department of Corrections Administrative Regulation 845 §I, (J.A. 18) (hereinafter referred to as A.R. 845).

Furthermore, neither the Statute nor the Regulation specify any remedy. The Statute speaks only of the "review of grievances," Ill. Rev. Stat. ch. 38, §1103-8-8 (a) (1979), and the Regulation refers only to "action" by the Chief Administrative Officer and a "final determination" of the grievance appeal by the Director of Corrections. A.R. 845 II(G), (N), (J.A. 17-18). Most important, the Statute and Regulation do not authorize the resolution of grievances through an award of damages to the grievants. A proceeding in the Illinois Court of Claims is the only mechanism the State of Illinois makes available for the award of damages from state funds. Ill. Rev. Stat. ch. 127, §801 (1979); Ill. Rev. Stat. ch. 37, §§439.1 *et seq.* (1979).[25] In the absence of a damage remedy the Illinois grievance procedure can obviously not fulfill either the compensatory or the deterrent func-

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[25] In recommending that Petitioner file in the Court of Claims, rather than pursue the appellate administrative grievance procedure, the Institutional Inquiry Board impliedly recognized the inadequacy of the Illinois grievance procedure where, as in Petitioner's case, redress other than simple return of missing property would be necessary should the claim prove meritorious. Report of Institutional Inquiry Board (J.A. 12). *See* Part IV C *infra*, at 43, for discussion of inadequacy of the Illinois Court of Claims remedy in Petitioner's case.

tions of section 1983.[26] *See Owen* v. *City of Independence*, 445 U.S. at 651.

Even if damages were authorized under the Illinois grievance procedure, that procedure gives no reason to believe prison officials could award damages or any other form of relief for deprivations of constitutional rights. The Seventh Circuit in *Secret* v. *Brierton*, 584 F.2d 823 (7th Cir. 1978), *supra*, at 11, did not address the procedure's lack of remedy for constitutional harms apparently because of its assumption that the plaintiff could receive adequate redress for his claim of an unconstitutional deprivation of property since all he really desired was the repair of his damaged radio. *Id.* at 828-29. Regardless of whether the Seventh Circuit correctly perceived the intentions of the plaintiff in *Secret*, it incorrectly assumed that administrative remedies based on common law principles of restitution are "fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection." *Monroe* v. *Pape*, 365 U.S. at 196 n.5 (1961) (Harlan, J., concurring). The harms incident to violations of due process of law, like the harms incident to rights under the first amendment, fourth amendment and equal protection clause, are not necessarily coextensive with any consequent detriment to property interests. For example, as this Court recognized in *Carey* v. *Piphus*, 435 U.S. at 262, a due process violation may result in emotional distress that is compensable apart from any damage to property interests. The inadequacy of the remedy envisioned in *Secret* is especially clear in

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[26] Moreover, as this Court recognized in *Carlson* v. *Green* 100 S. Ct. at 1475, even if an award of damages from state funds were authorized, the deterrent purposes of section 1983 would not be as effectively served as if damages were recoverable against officials individually.

the Petitioner's case since the relief requested in his federal court complaint includes not only reimbursement of $600.00 for the personal property taken from him, but also an award of $10,000 for damages suffered because of the illegal taking of his personal property. Complaint, at 4 (J.A. 5).

Moreover, the Seventh Circuit opinion in *Secret* makes explicit the impropriety of applying an exhaustion requirement in the context of Petitioner's case. The Seventh Circuit in *Secret* limits its exhaustion requirement to cases where the alleged deprivation without due process is of property "of no great monetary value" and where no liberty interest is involved, thereby excluding from the requirement cases where the deprivation of "legal materials" is alleged. *Id.* at 829. The Seventh Circuit's attempt to carve out an exception to its no-exhaustion rule for small property claims is unsupportable as a matter of law and policy.[27] It leaves no doubt,

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[27] In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), this Court explicitly rejected any distinction in the protection afforded by the due process clause to liberty and property claims:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a saving account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Id. at 552. Moreover, in creating what is in effect a jurisdictional requirement of an amount in controversy for section 1983 claims, the Seventh Circuit has invaded the province of the legislature and contradicted its judgment, expressed in 28 U.S.C. 1343(3), that no amount in controversy is a prerequisite to filing in federal court under section 1983. The Seventh Circuit's small claims exception to the no exhaustion rule is also highly uncertain in its application and unfair to the less affluent, especially those who are incarcerated.

however, that an administrative remedy is inappropriate to redress Petitioner's claim of a deprivation of property without due process of law, for the property Petitioner claimed was unconstitutionally taken was alleged to be worth $600.00 and to have included legal materials. Affidavit of Property Missing (J.A. 9-10).[28]

Personal possessions worth $600 are likely to be valued by a prisoner "disproportionately to their price on the open market." *Bonner* v. *Coughlin*, 517 F.2d 1311, 1314 (7th Cir. 1975) (opinion of Stevens, J.), *modified en banc* 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). *See Weddle* v. *Director, Patuxent Institution*, 405 U.S. 1036 (1972), *vacating* 436 F.2d 342 (4th Cir. 1970) (vacating dismissal of prisoner 1983 suit involving property having aggregate value of $3.52).

[28] Petitioner's *pro se* pleadings do not disclose whether the deprivation of his "legal materials" caused any interference with his ability to conduct ongoing legal proceedings. Petitioner's *pro se* petition for certiorari states that such materials included law books, two transcripts, numerous motions, a post conviction petition, legal correspondence and legal materials that his mother was to have taken to counsel. Petition for Cert., at 5-7. In the absence of any opportunity afforded by the District Court for Petitioner to prove the significance of the deprivation of his "legal materials," it was error to dismiss his *pro se* complaint for failure to exhaust administrative remedies since such remedies are clearly inappropriate to redress a claim of denial of access to court. See *Johnson* v. *Avery*, 393 U.S. 483, 485 (1969); *see also Hughes* v. *Rowe*, 49 U.S.L.W. 3346, 3347-78 (November 11, 1980) (per curiam) (prisoner's *pro se* complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 3347); *Bonner* v. *Coughlin*, 517 F.2d at 1321 n.29 (although "as a theoretical matter" prisoner could have filed necessary documents without transcripts, he "has a right to try to prove that the transcript disappearance sufficiently interferred with his effective exercise of his rights under Illinois law to give rise to a damage recovery.") In addition, the deprivation of Petitioner's property, which included legal and personal correspondence, implicated Petitioner's rights under the first amendment. *See Procunier* v. *Martinez* 416 U.S. 396, 408 (1973). Claims of deprivation of first amendment rights are similarly an inappropriate subject for an exhaustion of administrative remedies requirement since adequate redress can only be expected from the courts.

The Illinois grievance procedure also fails to provide adequate protection for constitutional rights because it does not afford grievants a meaningful hearing. The Regulation does not require that a grievant be given an opportunity to present evidence in addition to that of his own testimony or that he be given an opportunity to cross-examine witnesses. A.R. 845, II (E). (J.A. 17). Petitioner does not maintain that a prison grievance procedure need have all of the procedural protections of a court of law. However, because the ability to present witnesses in one's favor and to cross-examine adverse witnesses are essential elements of a fair and accurate fact-finding hearing, adequate protection for constitutional rights cannot be afforded in an administrative hearing without these safeguards. Although such safeguards are not always required in prison disciplinary proceedings, *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974), their requirement is justified here because the interest at stake, the adequate protection of constitutional rights, is of far greater legal significance.

Finally, the Illinois grievance procedure is inadequate to protect constitutional rights because the Institutional Inquiry Board, which hears the grievant's evidence, has no decision-making authority. It merely makes a recommendation to the prison's Chief Administrative Officer, who has decision-making authority, but no duty to hear any evidence. A.R. 845, II (F)(G) (J.A. 17). The administrative appeal procedure provides even more tenuous protection to grievants. The Administrative Review Board, which is convened only when the Director of Corrections feels an appeal has merit or should be investigated further, need not hear any evidence from the grievant or call any witnesses. Furthermore, it can only make findings and recommendations

for the consideration of the Director, who also need hear no evidence. A.R. 845, II (J), (L), (M), (N) (J.A. 18). As this Court noted in *McNeese* v. *Board of Education*, 373 U.S. at 675, a critical element of what would be an adequate administrative remedy, if such were possible under section 1983, is the ability of the hearing body to order corrective action. At no level of the Illinois prison grievance procedure does the body hearing evidence have that ability.

In sum, even if under certain circumstances administrative remedies were required to be exhausted under section 1983, it was error to dismiss Petitioner's Complaint for failure to exhaust the remedies provided by the Illinois prison grievance procedure because those remedies cannot provide adequate redress for Petitioner's constitutional claims. The Illinois procedure does not provide for an award of damages, does not provide redress for any constitutional violations and does not provide the basic elements of a fair hearing.

C. SINCE PURSUIT OF THE ADMINISTRATIVE REMEDIES REMAINING OPEN TO PETITIONER WOULD HAVE BEEN FUTILE, THE DISMISSAL OF HIS COMPLAINT FOR FAILURE TO EXHAUST SUCH REMEDIES WAS ERROR.

The exhaustion of administrative remedies doctrine does not apply where pursuit of such remedies would be futile. *Montana National Bank of Billings* v. *Yellowstone County of Montana*, 276 U.S. 499, 505 (1928). It also does not apply where the plaintiff cannot intelligently select the proper alternative state remedy and may therefore end up with no appropriate remedy whatever. *Wilwording* v. *Swenson*, 404 U.S. at 250. The Report of the Institutional Inquiry Board (J.A. 12) both left Petitioner with no reasonable doubt as to the futility of fur-

ther administrative appeal and directed him to an alternative remedy that would have been futile. Petitioner thereby found himself on an "Illinois merry-go-round" similar in operation to that decried by Justice Rutledge concurring in *Marino* v. *Ragen*, 332 U.S. 561, 570 (1947).

The District Court dismissed Petitioner's complaint because he failed to appeal to the Institutional Inquiry Board's denial of his grievance to the Director of the Department of Corrections. (J.A., 25-26). The Board, however, had made the recommendation that because Petitioner's claim of missing personal property could not be verified, the Petitioner may file in the Court of Claims. (J.A. 12). It was thus Petitioner's apparent reliance on the grievance system's own representation of the futility of further pursuit of the grievance process that resulted in Petitioner's failure to take the procedural steps later found necessary by the District Court. Moreover, even if Petitioner had been able to discover the jurisdictional and procedural prerequisities of filing in the Illinois Court of Claims, it would have been clear that such remedy offers no possibility of redress for constitutional violations by agencies of the State and is therefore irrelevant to his claim. Illinois Rev. Stat. ch. 37, §439.8(d) (1979), authorizes "claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit. . . ." Since, as Petitioner made clear in his amended complaint (J.A. 5) his claim is for damages for violation of his right to due process of law and equal protection of the laws, the state action prerequisite of such claim would preclude "a like cause of action . . . against a private person or corporation. . . ." thereby rendering exhaustion of the Court of Claims procedure futile.

Moreover, it is an established rule of the Illinois Court of Claims that "where the claimant has an adequate remedy in a court of general jurisdiction, the Court of Claims has no jurisdiction." *Rockford Memorial Hospital Assoc.* v. *Illinois*, 26 Ill. Ct. Cl. 215, 218 (1968). Since Illinois courts will entertain a claim for violation of constitutional rights under 42 U.S.C. 1983, *Bohacs* v. *Reid*, 63 Ill. App. 3d 477, 481-82, 379 N.E.2d 1372, 1375-76 (1978); *see also Martinez* v. *California* 444 U.S. 277, 283, n.7 (1980), the Illinois Court of Claims would deny Petitioner a remedy for his constitutional claim on this ground as well.

Perhaps if Petitioner had the advice of an attorney he would have ignored the Institutional Inquiry Board's finding that his remedy lay in the Court of Claims and instead, in spite of the absence of the requisite documentary evidence, he would have appealed to the Director of the Department of Corrections. To require this course of action of a layman, however, would be unrealistic and contrary to the pragmatic criteria that have characterized application of the exhaustion doctrine.

In sum, Petitioner has maintained that under no circumstances can exhaustion of the Illinois prison grievance procedures be required as a prerequisite to filing suit under section 1983. However, should this Court find to the contrary, then exhaustion could still not be required under the specific circumstances of this case unless the doctrine were to be used as a rote mechanism for denying or delaying access to federal court. Use of the doctrine for this end would be a serious distortion of its valid purposes.

V. The District Court Committed Additional Error In Dismissing Petitioner's Complaint Without Consideration Of The Facts Alleged In Petitioner's Proposed Amended Complaint.

In his proposed amended complaint filed August 16, 1979, Petitioner alleged that four named prison officials, including the Director of the Illinois Department of Corrections, and various unnamed prison officials conspired to deprive Petitioner of his personal property in violation of his rights to due process of law and equal protection of the laws.[29] Motion for Leave to Amend and Supplement Plaintiff's Original Complaint, (J.A. 20-23). In dismissing Plaintiff's complaint for failure to exhaust administrative remedies on October 24, 1979, the District Court effectively denied Plaintiff's motion for leave to amend without giving any justifying reason. In *Foman* v. *Davis*, 371 U.S. 178 (1962), this Court stated:

> Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. at 182.

Nevertheless, despite the absence of any declared reason for the denial of Petitioner's motion for leave to amend, such denial would probably not be deemed prejudicial error if the Record revealed good cause for denial, which, according to *Foman* would include reasons "such as undue delay, bad faith or dilatory

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[29] Petitioner's original complaint had named only Warden Brewer as the official responsible for the allegedly illegal deprivation of his property.

motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment. . . ." *Id.* No such reasons appear from the record in this case. Moreover, the new allegations in the motion for leave to amend provide added reason why Petitioner's failure to exhaust prison grievance procedure is an inappropriate ground for dismissal of Petitioner's case.

Exhaustion of administrative remedies will not be required if the claimant cannot reasonably expect that the administrative decision-maker will give the claim impartial consideration. *See Moore* v. *City of East Cleveland*, 431 U.S. 494, 529 n.4 (1977) (Burger, C.J., dissenting); *Gibson* v. *Berryhill*, 411 U.S. at 575 n.14. Where the basis of the claimed deprivation is that the individuals who will decide the claim intentionally caused that deprivation, the decision-making process obviously cannot be deemed impartial. This is exactly the circumstance in Petitioner's case, for one of the alleged co-conspirators, Lou Brewer, the Warden of Stateville prison, had final decision-making authority with respect to Petitioner's grievance at the initial hearing level, A.R. 845, II (G) (J.A. 17), and another alleged co-conspirator, Gale Franzen, Director of the Illinois Department of Corrections, had final decision-making authority at the appellate level. *Id.* at II (I) and (N), (J.A. 18).

In sum, Petitioner has maintained in the preceding arguments that the dismissal of his original complaint for failure to exhaust administrative remedies was clearly erroneous since his complaint alleged the deprivation of constitutional rights pursuant to section 1983. The additional allegations in his motion for leave to amend his

complaint provide further reason to reverse the dismissal for failure to exhaust because they demonstrate that such exhaustion would be futile in the context of biased decision-makers. Moreover, because the District Court's failure to allow the requested amendment to the pleadings appears to have no justification in the Record and is therefore contrary to this Court's construction of the purposes of Fed. R. Civ. P. 15(a), the Court of Appeals' affirmance of the District Court's dismissal should be reversed and the case remanded with directions to allow Petitioner to file the requested amended complaint.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the decision below of the United States Court of Appeals for the Seventh Circuit, affirming the dismissal of Petitioner's Complaint, be vacated with directions that the case be remanded to the District Court for further proceedings consistent with Pub. L. No. 96-247. In the alternative, Petitioner requests that the Seventh Circuit's decision below be reversed with directions that the case be remanded to the District Court for reinstatement of Petitioner's Complaint and further proceedings pursuant thereto. In addition, Petitioner requests that the case be remanded with directions that the District Court grant Petitioner's previously filed Motion For Leave To Amend and Supplement Plaintiff's Original Complaint.

Respectfully Submitted,

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STATUTORY APPENDIX

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Section 1983 of Title 42 of the United States Code:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349 (1980), Section 7. EXHAUSTION OF REMEDIES:

> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).
>
> (b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum

standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide —

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this act.

Illinois Unified Code of Corrections, 3-88; Illinois Rev. Stat. ch. 38, §1003-8-8 (1979).

§3-8-8. Grievances. (a) The Director shall establish procedures to review the grievances of committed persons. The Director may establish one or more administrative review boards within the Department to review grievances. A committed person's right to file grievances shall not be restricted. Such procedure shall provide for the review of grievances by a person or persons other than the person or persons directly responsible for the conditions or action against which the grievance is made.

(b) Such procedures shall provide that a record of such grievance and any decision made with respect to it shall be preserved for a period of one year.

(c) Such proceduces shall allow committed persons to communicate grievances directly to the Director or some person designated by the Director outside of the institution or facility where the person is confined.

(d) All committed persons shall be informed of the grievance procedures established by the Department and they shall be available to all committed persons.

(e) Discipline shall not be imposed because of use of the grievance procedure.

No. 80-5116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS,

Petitioner,

v.

LOU BREWER, Warden,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

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MOTION TO DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

NOW COMES Respondent, LOU BREWER, by and through his attorney, TYRONE C. FAHNER, Attorney General of Illinois, and hereby moves for the entry of an Order dismissing the Writ of Certiorari which was issued in this case, vacating the Order entered by the Seventh Circuit Court of Appeals, and remanding this case for further proceedings in light of a new statutory enactment, The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247. This statute was not brought to the attention of the lower court and appears to be dispositive of the issues raised in the instant case.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CERTIORARI

Factual Background:

The sole issue presented by this case is whether the plaintiff, who is a state prisoner, should be required to exhaust his state administrative remedies prior to filing a Civil Rights action under 42 U.S.C. § 1983 for the deprivation of certain items of personal property.

On June 20, 1980, the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of plaintiff's complaint for his failure to exhaust his administrative remedies. In reaching this decision, the Court did not consider the case in light of the Civil Rights of Institutionalized Persons Act, 94 Stat. 349 (1980) (See Appendix for text), because this law was newly enacted and counsel were not aware of it.

In fact, Counsel for Respondent only became aware of this legislation when it was cited in Petitioner's Brief. On or about January 9, 1981, Counsel for Respondent contacted the Illinois Department of Corrections and requested a meeting to discuss this litigation. This meeting took place on January 13, 1981, and at that time, counsel advised the Department that a Motion to Dismiss Certiorari should be made immediately. Due to a variety of factors, including the resignation of the Director of the Department, written authorization for this motion was not received until January 28, 1981.

Discussion:

The Civil Rights of Institutionalized Persons Act provides for the exhaustion of state administrative remedies only where those remedies meet the "minimum standards" enumerated in § 7(2)(b)(2). Since the Court below was unaware of the existence of this legislation, it did not examine the Illinois grievance procedure in order to determine whether it was in compliance with these standards. In view of this intervening

federal legislation, it is now appropriate for this Court to dismiss certiorari, vacate the Order entered by the Seventh Circuit and remand this case for further proceedings so that the Court below can reconsider the case in light of this new law.

Where a change in the law has occurred prior to the time this Court grants a writ of certiorari, but this Court does not become fully aware of the implications until after the writ has issued, it is settled that the writ should be dismissed as improvidently granted. *See: Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 99 L. Ed. 897 (1955).

In his brief, the Petitioner argues that the enactment of the Civil Rights of Institutionalized Persons Act requires that the Seventh Circuit's decision in this case be vacated (Petitioner's Brief, pp. 11-13) and the Respondents agree with this conclusion. This Court will not consider this case in its present posture because the relevant law was not considered by the Court below. Accordingly, Respondent asks this court to dismiss the writ of certiorari as improvidently granted, vacate the Order entered by the Seventh Circuit, and remand this case to the lower Court.

Respectfully submitted,

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APPENDIX

PUBLIC LAW 96-247 [H.R. 10]; MAY 23, 1980

CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT

An Act to authorize actions for redress in cases involving deprivations of rights of institutionalized persons secured or protected by the Constitution or laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights of Institutionalized Persons Act".

SEC. 2. DEFINITIONS.

As used in this Act—

(1) The term "institution" means any facility or institution—

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is—

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles—

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary

education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

(2) Privately owned and operated facilities shall not be deemed "institutions" under this Act if—

(A) the licensing of such facility by the State constitutes the sole nexus between such facility and such State;

(B) the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State; or

(C) the licensing of such facility by the State, and the receipt by such facility, on behalf of persons residing in such facility, of payments under title XVI, XVIII, or under a State plan approved under title XIX, of the Social Security Act, constitutes the sole nexus between such facility and such State;

(3) The term "person" means an individual, a trust or estate, a partnership, an association, or a corporation;

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States;

(5) The term "legislative days" means any calendar day on which either House of Congress is in session.

SEC. 3. INITIATION OF ACTIONS.

(a) Whenever the Attorney General has reasonable cause to believe that any State or political subdivision of a State, official, employee, or agent thereof, or other person acting on behalf of a State or political subdivision of a State is subjecting persons residing in or confined to an institution, as defined in section 2, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities, except that such equitable relief shall be available under this Act to persons residing in or confined to an institution as defined in section 2(1)(B)(ii) only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

(b) In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs.

(c) Any complaint filed by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 4. CERTIFICATION REQUIREMENTS.

(a) At the time of the commencement of an action under section 2 the Attorney General shall certify to the court—

(1) that at least 49 calendar days previously he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of—

(A) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(B) the supporting facts giving rise to the alleged conditions and the alleged pattern or practice, including the dates or time period during which the alleged conditions and pattern or practice of resistance occurred; and when feasible, the identity of all persons reasonably suspected of being involved in causing the alleged conditions and pattern or practice at the time of the certification, and the date on which the alleged conditions and pattern or practice were first brought to the attention of the Attorney General; and

(C) the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance;

(2) that he has notified in writing the Governor or chief executive officer and attorney general or chief legal officer of the appropriate State or political subdivision and the director of the institution of his intention to commence an investigation of such institution, that such notice was delivered at least seven days prior to the commencement of such investigation and that between the time of such notice and the commencement of an action under section 3 of this Act—

(A) he has made a reasonable good faith effort to consult with the Governor or chief executive officer and attorney general or chief legal officer of the

appropriate State or political subdivision and the director of the institution, or their designees, regarding financial, technical, or other assistance which may be available from the United States and which he believes may assist in the correction of such conditions and pattern or practice of resistance;

(B) he has encouraged the appropriate officials to correct the alleged conditions and pattern or practice of resistance through informal methods of conference, conciliation and persuasion, including, to the extent feasible, discussion of the possible costs and fiscal impacts of alternative minimum corrective measures, and it is his opinion that reasonable efforts at voluntary correction have not succeeded; and

(C) he is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions and pattern or practice, taking into consideration the time required to remodel or make necessary changes in physical facilities or relocate residents, reasonable legal or procedural requirements, the urgency of the need to correct such conditions, and other circumstances involved in correcting such conditions; and

(3) that he believes that such an action by the United States is of general public importance and will materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Any certification made by the Attorney General pursuant to this section shall be personally signed by him.

SEC. 5. INTERVENTION IN ACTIONS.

(a)(1) Whenever an action has been commenced in any court of the United States seeking relief from egregious or flagrant conditions which deprive persons residing in in-

stitutions of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing them to suffer grievous harm and the Attorney General has reasonable cause to believe that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may intervene in such action upon motion by the Attorney General.

(2) The Attorney General shall not file a motion to intervene under paragraph (1) before 90 days after the commencement of the action, except that if the court determines it would be in the interests of justice, the court may shorten or waive the time period.

(b)(1) The Attorney General shall certify to the court in the motion to intervene filed under subsection (a)—

(A) that he has notified in writing, at least fifteen days previously, the Governor or chief executive officer, attorney general or chief legal officer of the appropriate State or political subdivision, and the director of the institution of—

(i) the alleged conditions which deprive rights, privileges, or immunities secured or protected by the Constitution or laws of the United States and the alleged pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities;

(ii) the supporting facts giving rise to the alleged conditions, including the dates and time period during which the alleged conditions and pattern or practice of resistance occurred; and

(iii) to the extent feasible and consistent with the interests of other plaintiffs, the minimum measures which he believes may remedy the alleged conditions and the alleged pattern or practice of resistance; and

(B) that he believes that such intervention by the United States is of general public importance and will

materially further the vindication of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(2) Any certification made by the Attorney General pursuant to this subsection shall be personally signed by him.

(c) Any motion to intervene made by the Attorney General pursuant to this section shall be personally signed by him.

(d) In any action in which the United States joins as an intervenor under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. Nothing in this subsection precludes the award of attorney's fees available under any other provisions of the United States Code.

SEC. 6. PROHIBITION OF RETALIATION.

No person reporting conditions which may constitute a violation under this Act shall be subjected to retaliation in any manner for so reporting.

SEC. 7. EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such adminis-

trative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

SEC. 8. REPORT TO CONGRESS.

The Attorney shall include in his report to Congress on the business of the Department of Justice prepared pursuant to section 522 of title 28, United States Code—

(1) a statement of the number, variety, and outcome of all actions instituted pursuant to this Act including the history of, precise reasons for, and procedures followed in initiation or intervention in each case in which action was commenced;

(2) a detailed explanation of the procedures by which the Department has received, reviewed and evaluated petitions or complaints regarding conditions in institutions;

(3) an analysis of the impact of actions instituted pursuant to this Act, including, when feasible, an estimate of the costs incurred by States and other political subdivisions;

(4) a statement of the financial, technical, or other assistance which has been made available from the United States to the State in order to assist in the correction of the conditions which are alleged to have deprived a person of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States; and

(5) the progress made in each Federal institution toward meeting existing promulgated standards for such institutions or constitutionally guaranteed minima.

SEC. 9. PRIORITIES FOR USE OF FUNDS.

(a) It is the intent of Congress that deplorable conditions in institutions covered by this Act amounting to deprivations of rights protected by the Constitution or laws of the United States be corrected, not only by litigation as contemplated in this Act, but also by the voluntary good faith efforts of agencies of Federal, State, and local governments. It is the further intention of Congress that where Federal funds are available for use in improving such institutions, priority should be given to the correction or elimination of such unconstitutional or illegal conditions which may exist. It is not the intent of this provision to require the redirection of funds from one program to another or from one State to another.

SEC. 10. NOTICE TO FEDERAL DEPARTMENTS.

At the time of notification of the commencement of an investigation of an institution under section 3 or of the notification of an intention to file a motion to intervene under section 5 of this Act, and if the relevant institution receives Federal financial assistance from the Department of Health and Human Services or the Department of Education, the Attorney General shall notify the appropriate Secretary of his action and the reasons for such action and shall consult with such officials. Following such consultation, the Attorney General may pro-

ceed with an action under this Act if he is satisfied that such action is consistent with the policies and goals of the executive branch.

SEC. 11. DISCLAIMER—STANDARDS OF CARE.

Provisions of this Act shall not authorize promulgation of regulations defining standards of care.

SEC. 12. DISCLAIMER—PRIVATE LITIGATION.

The provisions of this Act shall in no way expand or restrict the authority of parties other than the United States to enforce the legal rights which they may have pursuant to existing law with regard to institutionalized persons. In this regard, the fact that the Attorney General may be conducting an investigation or contemplating litigation pursuant to this Act shall not be grounds for delay of or prejudice to any litigation on behalf of parties other than the United States.

Approved May 23, 1980.

SUPREME COURT, U.S.
FILED
JAN 2 1981

No. 80-5116

In the Supreme Court of the United States

OCTOBER TERM, 1980

DANE LAMAR JENKINS,

Plaintiff-Appellant,

vs.

LOU BREWER, Warden,

Defendant-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE JOHN HOWARD ASSOCIATION AND BRIEF OF THE JOHN HOWARD ASSOCIATION AS AMICUS CURIAE

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5116

DANE LAMAR JENKINS,
Plaintiff-Appellant,

vs.

LOU BREWER, Warden,
Defendant-Appellee.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON BEHALF OF THE JOHN HOWARD ASSOCIATION

The John Howard Association hereby respectfully moves for leave to file the attached brief as *amicus curiae*. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested, but refused.

The John Howard Association ("Association") is a private, not-for-profit service agency engaged in monitoring penal institutions and correctional services in the United States. The Association is an advocate for fair and

efficient administration of criminal justice. The Association seeks improvement in the practices and procedures of the criminal justice system and guards against the erosion of prisoners' civil rights.

The Association has an interest in this case because the decision of the Court of Appeals greatly effects the manner in which prisoners may bring §1983 actions to redress deprivations of constitutional rights and because the affirmance of the decision below would overrule twenty years of civil rights precedent and a dozen Supreme Court decisions and would contravene Congress' intent dealing with prisoners' rights.

The Association seeks to file a brief as *amicus curiae* because it wishes to advance additional arguments in support of petitioner's request that the dismissal of his claims under §1983 be vacated and that the Seventh Circuit's rule requiring prior exhaustion of administrative remedies for prisoners' §1983 actions alleging deprivation of property "of no great monetary value" be reversed.

For the foregoing reasons, the Association respectfully requests that it be granted leave to file the attached brief.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-5116

DANE LAMAR JENKINS,

Plaintiff-Appellant,

vs.

LOU BREWER, Warden,

Defendant-Appellee.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE JOHN HOWARD ASSOCIATION AS AMICUS CURIAE

STATEMENT OF INTEREST

The John Howard Association ("Association") is a private, not-for-profit service agency engaged in monitoring penal institutions and correctional services in the United States. The Association is an advocate for fair

and efficient administration of criminal justice. The Association seeks improvement in the practices and procedures of the criminal justice system and guards against the erosion of prisoners' civil rights.

The Association has an interest in this case because it presents an important prisoner's civil rights issue: whether prisoners must exhaust their state administrative remedies before bringing actions under §1983 for deprivation of property without due process of law. The Association also has an interest in commenting on the effectiveness of the current administrative review procedure in the Illinois Stateville Correctional Center.

This brief is submitted in support of the petitioner's position.

SUMMARY OF ARGUMENT

In this case, the Seventh Circuit held that prior to bringing §1983 actions to redress the deprivation of civil rights, prisoners must exhaust their administrative remedies. To affirm that decision, this Court would have to overrule a long line of Supreme Court precedents which have consistently held that there is no exhaustion requirement for §1983 cases. Moreover, this Court has never recognized but has specifically rejected any exception to the no-exhaustion rule based on prisoner status or amount in controversy. Additionally, requiring exhaustion would directly contravene Congress' intent in providing a federal remedy for civil rights violations and would severely prejudice prisoners' rights. Finally, if exhaustion is required, it can only be required where the administrative remedies are adequate and the administrative review procedures at Illinois' Stateville Correctional Center are hopelessly inadequate.

ARGUMENT

I.

Twenty Years Of Precedent And A Dozen Supreme Court Decisions Must Be Overruled If This Court Is To Affirm The Decision Below.

Over the last twenty years, and in numerous settings, this Court has consistently held that §1983 suits may be maintained by an aggrieved person without first seeking or exhausting state judicial or administrative remedies. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961) (unreasonable search and seizure), *overruled on other grounds, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978); *McNeese* v. *Board of Education,* 373 U.S. 668, 672 (1963) (unconstitutional assignment of public school students to classrooms on a racial basis); *Damico* v. *California,* 389 U.S. 416, 417 (1967) (welfare regulations); *King* v. *Smith,* 392 U.S. 309, 312 (1968) (aid to dependent children regulations); *Carter* v. *Stanton,* 405 U.S. 669, 671 (1972) (state welfare regulations); *Metcalf* v. *Swank,* 406 U.S. 914 (1972) (state welfare regulations); *Gibson* v. *Berryhill,* 411 U.S. 564, 574 (1973) (licensing revocation proceeding); *Steffel* v. *Thompson* 415 U.S. 452, 472-73 (1974) (public handbilling); and *Ellis* v. *Dyson,* 421 U.S. 426, 432-33 (1975) (loitering ordinance).

This Court has applied the no exhaustion rule in numerous cases involving claims by prisoners under §1983. In *Houghton* v. *Shafer,* 392 U.S. 639, 640 (1968), a case very similar to the instant case, this Court held that a prisoner challenging the confiscation of his legal materials need not exhaust prison administrative remedies

as a condition of bringing a §1983 suit. In *Wilwording* v. *Swenson,* 404 U.S. 249, 251 (1971), this Court held that prisoners were entitled to maintain federal habeas corpus actions for deprivation of constitutional rights as claims under §1983 and thereby avoid the habeas corpus exhaustion requirement. In addition, in *Preiser* v. *Rodriguez,* 411 U.S. 475, 494 (1973), this Court ruled that prisoners may bring §1983 actions to remedy the conditions of their confinement without prior exhaustion of state remedies.

For this Court now to affirm the Seventh Circuit and rule that prisoners must exhaust administrative remedies before bringing actions in federal court to seek redress for the deprivation of their constitutional rights would be contrary to every one of this Court's well-reasoned precedents and would violate the long established principle of *stare decisis.* None of the factors which might justify overturning a long line of cases construing civil rights legislation apply to the twelve civil rights decisions cited above. *See Monell* v. *Department of Social Services,* 436 U.S. 658, 695-701, 709 (1978).

This Court should not, therefore, turn its back on its prior decisions and, for the sake of convenience, deny prisoners a federal forum for protecting their constitutional rights under §1983.

II.

The Relevant Supreme Court Decisions Preclude An Exception To The No Exhaustion Rule In §1983 Cases Based On The Prisoner Status Of The Plaintiff Or The Amount In Controversy.

In granting defendant's motion to dismiss this case, the trial court held that the decision of the Seventh Circuit in *Secret* v. *Brierton,* 584 F.2d 823 (7th Cir. 1978), "directly controls this case. Exhaustion of administrative reme-

dies is required in prisoner §1983 cases which allege deprivation without due process of tangible items of personal property of no great monetary value. 584 F.2d at 829." Memorandum Opinion and Order of October 24, 1972, at 2. In affirming the dismissal, the Seventh Circuit stated: "[W]e agree with the district court that the plaintiff failed to exhaust his administrative remedies as required by *Secret* v. *Brierton* [citation omitted]." Order of June 20, 1980.

In the *Secret* case, the Seventh Circuit gave a narrow and unnatural reading to this Court's precedents in attempting to carve out an exception to the well established rule of this Court concerning exhaustion in §1983 cases.[1] The Seventh Circuit conceded that it could not find any support for its decision from the relevant Supreme Court cases, but explained its unprecedented decision by stating that "[w]e suggest only that these opinions do not preclude our decision in the present case." 584 F.2d at 828. The Seventh Circuit said that it would confine its holding "to prisoner §1983 cases which allege deprivation without due process of law of tangible items of personal property of no great monetary value." 584 F.2d at 829.

A. Prisoner Status Is Not A Justification For Imposing An Exhaustion Requirement.

The Seventh Circuit based its new exhaustion rule in §1983 cases in part on a distinction between prisoners and other §1983 plaintiffs. This approach is directly con-

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[1] Until the decision in *Secret*, the Seventh Circuit followed the principle laid down by this Court that exhaustion of administrative remedies is not required. *See Nickerson* v. *Thomson*, 504 F.2d 813, 817 (7th Cir. 1974); *Brooks* v. *Center Township*, 485 F.2d 383, 386 (7th Cir. 1973).

trary to this Court's rulings in *Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968), *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971), and *Preiser* v. *Rodriguez*, 411 U.S. 475, 494 (1973).

A distinction between prisoners and other §1983 litigants is not a legitimate basis for establishing an exception to the no exhaustion rule. This distinction was explicitly considered and rejected by this Court in *Wilwording* v. *Swenson*, 404 U.S. 249 (1971).[2]

In *Wilwording*, a district court dismissed a prisoners' §1983 complaint on the ground that the plaintiff prisoners had neither exhausted their state judicial remedies nor sought relief that was available to them under their state's administrative procedure act. 404 U.S. at 249-50. The Court of Appeals affirmed the dismissal. This Court reversed, holding that exhaustion of state remedies was not required because "prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. This Court also noted that the efficacy of any available state remedy was immaterial because "in 'any event, resort to these remedies is unnecessary.' " 404 U.S. at 252, *quoting Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968).

The Seventh Circuit's opinion in *Secret* attempts to narrow this Court's decision in *Wilwording* by baldly asserting that only judicial remedies were actually involved in that case and that "any intimation of an inflexible rule against exhaustion of state administrative remedies was dicta." 584 F.2d at 827. That assertion is simply incorrect.

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[2] As well as being inconsistent with previous decisions of this Court, the Seventh Circuit's distinction raises additional and serious equal protection questions under the fourteenth amendment. *See Reed* v. *Reed*, 404 U.S. 71 (1971).

This Court unambiguously stated that the complaint in *Wilwording* had been dismissed because plaintiffs had failed to exhaust state judicial *and* administrative remedies. 404 U.S. at 249-50. Thus, in reversing that dismissal order, this Court held that exhaustion of administrative remedies was not required. If the ruling of this Court was otherwise, this Court would have affirmed the decision of the lower court because the prisoners had failed to exhaust their state administrative remedies.

Far from being *dicta,* the holding in *Wilwording* was both consistent with, and required by, this Court's prior decisions. In *Houghton* v. *Shafer,* 392 U.S. 639 (1968), for example, this Court reversed the decision of a lower court which had dismissed a prisoner's civil rights action for failure to exhaust administrative remedies. After discussing the adequacy of the relief that might have been administratively available, the Court concluded that "in any event resort to these remedies is unnecessary." 392 U.S. at 640.

B. Lack of Great Monetary Value Is Not A Justification For Requiring Exhaustion.

The Seventh Circuit in *Secret* also based its newly created exhaustion rule in §1983 cases on the value of the personal property involved. 584 F.2d at 829. That portion of the Seventh Circuit's holding clearly is inconsistent with this Court's statement in *Goss* v. *Lopez,* 419 U.S. 565, 576 (1975), that "as long as property deprivation is not *de minimis,* its gravity is irrelevant." Moreover, in *Weddle* v. *Director, Patuxent Institution,* 405 U.S. 1036 (1972), *vacating* 436 F.2d 342 (4th Cir. 1970), this Court recognized that a state prisoner's claim for deprivation of property was cognizable under §1983 even when the property at

stake had an aggregate value of only $3.52.[3] In effect, the Seventh Circuit has legislated an amount in controversy requirement, which Congress has not seen fit to impose in civil rights cases, even though, as noted *infra* at 14-16, it has specifically addressed the matter.

While the Seventh Circuit's decision in *Secret* was obviously motivated by a concern that frivolous complaints should be removed from the federal docket, the court's attempt to weed out frivolous complaints by considering only the monetary value of the property involved is neither workable nor based on a realistic assessment of the interest involved. Rather than eliminating frivolous §1983 cases, the vagueness of the court's standard—"property of no great monetary value"—can only generate further layers of appeals in §1983 cases, because the district courts must decide whether particular property such as books, papers and other personal possessions have "no great monetary value."

The decision of the Seventh Circuit in *Secret* attempts to distinguish between liberty and property interests for exhaustion purposes. In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), this Court held that §1983 affords protection to *both* liberty and property interests on equal footing.

The Seventh Circuit in *Secret* failed to recognize that liberty interests necessarily are interwoven with property interests, and thus different treatment cannot be given to each. This is especially true when the property in-

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[3] In *Russell* v. *Bodner*, 489 F.2d 280 (3d Cir. 1973), the court refused to dismiss a §1983 action where the property involved was seven packages of cigarettes. The court flatly stated: "The value of the cigarettes is not determinative of the federal court's jurisdiction in a Civil Rights Act case." 489 F.2d at 281.

volved is books, papers and legal documents.[4] It has long been recognized that prisoners have a special interest in their transcripts, legal papers, and research books. *See, e.g., Griffin* v. *Illinois,* 351 U.S. 12, 19 (1956); *Bounds* v. *Smith,* 430 U.S. 817, 824-25, 828 (1976). State action depriving a prisoner of his legal books and papers violates not only a property right, but a liberty interest as well. As this Court held in *Bounds* v. *Smith, supra:* "It is now established beyond doubt that prisoners have a constitutional right of access to the courts," 430 U.S. at 821, and that legal papers and research books play a major role in that liberty interest.

Justice Stevens has wisely suggested that the value of property to a prisoner may be "disproportionate to [its] price on the open market." *Bonner* v. *Coughlin,* 517 F.2d 1311, 1314 (7th Cir. 1975), *rev'd in part on other grounds* 545 F.2d 565 (7th Cir. 1976) (en banc), *cert. denied* 435 U.S. 932 (1978). This concept is underscored when considered in light of the general principle that a prisoner's right to possess property is necessarily limited by his incarceration. *See Secret* v. *Brierton, supra,* 584 F.2d at 830. Thus, the few possessions a prisoner has a legal right to keep take on special significance and added value.

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[4] Included in the list of personal property items taken from the Petitioner are "Legal Correspondence, Personal Correspondence, Numerous Motions, Two Transcripts, Post-Conviction Petition, . . . 1 Dictionary, . . . 3 Law Books, . . . 8 Text Books" and assorted other communicative materials. Affidavit of Dane Lamar Jenkins. By requiring the Petitioner to exhaust his administrative remedies in this case, the Seventh Circuit has concluded that "property of no great monetary value" necessarily encompasses a prisoner's books and papers—those items of personal property that civilized society has particularly cherished from earliest times, and to which our constitutional tradition has always afforded special consideration. *See Boyd* v. *United States,* 116 U.S. 616 (1886).

A legal standard based upon the value of property in §1983 cases is, therefore, unworkable and unjustified.

C. Other Circuits Consistently Have Rejected The Justifications For Exhaustion Offered By The Seventh Circuit.

The artificial distinctions of Supreme Court precedent that were accepted by the Seventh Circuit in *Secret* and applied in this case have been repeatedly rejected by other Courts of Appeal.

In *McCray* v. *Burrell,* 516 F.2d 357 (1975), *cert. dismissed as improvidently granted,* 426 U.S. 471 (1976), the Fourth Circuit *en banc* confronted the argument that a state prisoner must exhaust available administrative remedies before a federal district court can adjudicate his claim under §1983. *Burrell,* like *Secret,* attempted to distinguish *McNeese, Houghton, Wilwording,* and similar Supreme Court cases. 516 F.2d at 362. The Fourth Circuit concluded after a "survey . . . of the pertinent authorities" that "the law would appear overwhelming that exhaustion of available state administrative remedies is not a prerequisite" to a federal suit and therefore refused to dismiss claims by prisoners. 516 F.2d at 363.

The Third, Fifth, Sixth and Eighth Circuits also have squarely addressed the question of whether state prisoners must exhaust administrative remedies and have reached the same result. *United States ex rel. Ricketts* v. *Lightcap,* 567 F.2d 1226 (3d Cir. 1977); *Hardwick* v. *Ault,* 517 F.2d 295 (5th Cir. 1975); *Jones* v. *Metzger,* 456 F.2d 854 (6th Cir. 1972); *McClelland* v. *Sigler,* 456 F.2d 1266 (8th Cir. 1972). In so holding, those Courts of Appeal have specifically recognized that prisoners cannot be subjected to stricter requirements than other litigants, *see, e.g., Jones*

v. *Metzger,* 456 F.2d at 856, and have applied the non-exhaustion rule to cases involving property claims by prisoners. *See, e.g., Bryant* v. *Potts,* 528 F.2d 621 (5th Cir. 1976).

Only two Circuits, the Second and the Ninth, have deviated from this firm no-exhaustion position; even those Circuits would not have required exhaustion in this case. The Ninth Circuit requires exhaustion only when the remedy sought is prospective. *See Toney* v. *Reagan,* 467 F.2d 953 (9th Cir. 1972), *cert. denied,* 409 U.S. 1130 (1973). Because the plaintiff in this case has requested "relief from" and "compensation for, a deprivation of civil rights which ha[s] already occurred," no exhaustion would be necessary in the Ninth Circuit. *Canton* v. *Spokane School District #81,* 498 F.2d 840, 844 (9th Cir. 1974). While the Second Circuit, "albeit with some hesitation," *Fuentes* v. *Roher,* 519 F.2d 379, 386 (2d Cir. 1975), has articulated an exhaustion requirement based upon adequacy, its standard for determining whether the remedy is adequate clearly has not been satisfied in this case and thus, under the Second Circuit precedent, this case would not require prior exhaustion. *See* Section V *infra.*

III.

To Require Exhaustion of Administrative Remedies Would Contravene Congress' Intent.

Requiring plaintiffs in §1983 actions to exhaust their administrative remedies is contrary to Congress' intent in creating and maintaining a separate, independent federal remedy for the vindication of civil rights violations. Congress, in enacting §1983, did not trust the States to protect federal constitutional rights, and thus gave federal courts the power to protect those rights without prior

resort to state remedies.[5] This Court has found this to be Congress' intent on several occasions. *See, e.g., Monroe* v. *Pape,* 365 U.S. 167, 171-84 (1961), *overruled on other grounds, Monell* v. *Department of Social Services,* 436 U.S. 658 (1978); *McNeese* v. *Board of Education,* 373 U.S. 668, 671-72 (1963).

In enacting §1983, Congress intended that the protection of federal rights not be made to depend upon any state remedies, either judicial or administrative, whether available or adequate, in theory or in practice. *Mitchum* v. *Foster,* 407 U.S. 225, 239-42 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 245-47 (1967). "By that statute '. . . Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts . . . became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Zwickler* v. *Koota,* 389 U.S. 241, 247 (1967), quoting Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 65 (emphasis added by the Court).

The specific intent of Congress has most recently been expressed in the adoption of 42 U.S.C. §1997e.[6] That section

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[5] In response to the reign of terror and violence conducted by the Klu Klux Klan following the Civil War, President Grant asked Congress for legislation to alleviate the problem. *District of Columbia* v. *Carter,* 409 U.S. 418, 426-29 (1973). Congress responded with §1 of the Klu Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13. The Act was later codified as 42 U.S.C. §1979, and later, as 42 U.S.C. §1983. No major revisions occurred with either codification.

[6] If Congress had wished to burden access to the Courts in this area with an exhaustion requirement it would have done so explicitly as it did in 28 U.S.C. § 2254, which requires exhaustion before seeking Federal habeas corpus. Given Congress' clear decision not to burden §1983 with a similar exhaustion requirement, it would be an impermissible exercise of judicial law-making for this Court to legislate in the area.

provides that in any action brought under §1983 by an incarcerated adult, "the Court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available."[7] Thus, Congress specifically addressed the subject of exhaustion of administrative remedies by prisoners suing under §1983 and chose not to condition the right to sue upon exhaustion. Instead, Congress has recognized the federal court's proper jurisdiction of prisoner §1983 suits and authorized Federal Courts to require exhaustion only by continuing the case for 90 days or less —not by dismissal for lack of jurisdiction.

Moreover, the section further provides that a court may not continue a case to require exhaustion "unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section." 42 U.S.C. §1997e(a)(2).

Under §1997e(b) the Attorney General is to promulgate standards which shall at a minimum provide:

> "(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

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[7] This statute, Pub. L. 96-247, §7, 94 Stat. 352, was adopted on May 23, 1980. It is applicable to the instant case because its enactment precedes final ruling by this Court. *See*, e.g., *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975).

"(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

"(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

"(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

"(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution."

The Attorney General has not certified nor has any court determined that the administrative review procedures in effect for the Stateville Correctional Center are in substantial compliance with the minimum safeguards established by Congress in §1997e. Therefore, this Court should reverse the dismissal of Petitioner's claims for failure to exhaust administrative remedies.

IV.

A Requirement That Prisoners Exhaust A State Administrative Remedy In §1983 Cases Will Severely Prejudice Prisoners' Rights And Will Not Enhance The Administration Of Justice.

In the past, state prison officials have been openly hostile to prison reforms and to vindication of federal civil rights. While not all prison officials share this hostility, institutional factors remain which make a federal forum desirable. The prison administrator hearing

a complaint which might give rise to a §1983 action must assess the propriety of the state and prison regulations of which he or she is a part. Prison officials under those circumstances may find it difficult to assess damages against other prison officials even if authorized to do so.[8] Federal judges are not susceptible to these parochial pressures. Federal remedial and procedural tools are, therefore, likely to be more effective in enforcing federal rights than State administrative remedies. For example, exhaustion of state administrative remedies even though it would otherwise be appropriate, is never required where the plaintiff raises issues beyond the expertise of state administrative agencies. *Plano* v. *Baker,* 504 F.2d 595 (2d Cir. 1974) (first amendment issues); *Green* v. *Ten Eyck,* 572 F.2d 1233 (8th Cir. 1978) (right to nondiscriminatory housing).[9] Given Congress' intent to provide a uniquely federal remedy for §1983 violations, all issues attendant to a prisoner's claim for deprivation of his civil rights are likely to be beyond the authority or expertise of prison grievance committee members and are best left to the expertise of the federal courts.

The delays inherent in prisoner grievance proceedings are severe. The Illinois procedures, for example, do not provide time limits within which the review process must be completed. The internal grievance procedure could stretch for months or even years. Requiring the exhaustion of administrative remedies will not lighten the

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[8] The Stateville Internal Grievance Procedures do not include the authority to assess damages.

[9] In the case at bar the plaintiff's items of personal property included legal documents, books, paper and pens and other communicative materials. Affidavit of Dane Lamar Jenkins. The nature of these materials suggests that if the district court had allowed the case to go forward, issues such as the right of access to the courts and the right to free expression of ideas might have been developed. These issues are beyond the expertise of State administrative agencies.

work of the federal district courts. Suits brought under §1983 are not reviews of administrative action. They are cases of first impression with original jurisdiction in the district courts. 28 U.S.C. §1343. Any testimony or written records developed by an administrative agency would have no meaning in the federal action. The administrative grievance procedures would, thus, add considerable delay to the resolution of deprivations of constitutional rights without any overriding societal benefits.

Not only does an administrative exhaustion requirement impose undue delay, but it also creates a more invidious problem. The underlying assumption is that resort to an administrative grievance procedure would not deprive a prisoner of an opportunity to air his complaint before a federal court. *See Secret* v. *Brierton,* 584 F.2d 823, 828 (7th Cir. 1978). However, this Court has held that state statutes of limitations and the coordinate state tolling rules govern the time for filing §1983 actions. *Board of Regents* v. *Tomanio,* 446 U.S. 478, 100 S. Ct. 1790, 1794 (1980). In *Tomanio,* the filing of a state court claim did not toll the running of the limitation period for filing a federal §1983 claim. 100 S.Ct. at 1799. This leads to the incongrous result that in some jurisdictions the time required for exhaustion of administrative remedies will preclude timely filing of prisoners' claims under §1983. Thus the courthouse door would be completely closed to certain prisoners' §1983 claims.

An entire class of persons, such as prisoners, should not be excluded from court merely because some future litigant might assert a frivolous claim. This court rejected this "frivolity" argument in *Boddie* v. *Connecticut,* 401 U.S. 371, 381-82 (1971), and suggested an alternate remedy of imposing sanctions in specific lawsuits rather than barring the litigation wholesale. Courts "must not play

fast and loose with basic constitutional rights in the interest of administrative efficiency. [Citation omitted]." *Sewell* v. *Pegelow,* 291 F.2d 196, 198 (4th Cir. 1961). Although judicial resources are increasingly scarce, that is not a reason for denying an individual or a class of individuals a forum for protecting their constitutional rights. *See, Bivens* v. *Six Unknown Agents,* 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

V.

If Exhaustion Is Required, This Court Must Correct The Seventh Circuit's Approval Of Illinois' Hopelessly Inadequate Procedures.

If exhaustion is required, it can only be required where the administrative remedies are adequate. The internal grievance procedures at Illinois' Stateville Correctional Center are hopelessly inadequate.

The district court below in an opinion adopted by the Court of Appeals stated: "In view of the facts that the appeal procedure at issue here is the very same one expressly approved by the Court of Appeals in *Secret, id.* at 832, and that petitioner has put forward no reasons why it should be considered 'inherently unfair,' this court cannot say that such an appeal would have been futile." Memorandum Opinion and Order of October 24, 1979 at 2. In the *Secret* case, the Seventh Circuit declared, without any evidentiary hearing, that Stateville's administrative procedures were adequate because they were "capable" of providing the remedy sought in a reasonable time and were not "so inherently unfair that utilization of them would be futile." 584 F.2d at 831. In so holding, the Seventh Circuit applied a standard considerably more lax than the standard mandated by this Court and the standard consistently applied by other Circuits when administrative exhaustion has been required.

Contrary to the Seventh Circuit's impression (584 F.2d at 831), there is not an absence of case law guidance on the types of procedures necessary to qualify an administrative remedy as adequate. Most notably, the Second Circuit already has held that administrative review proceedings must provide the following opportunities in order to be deemed a prerequisite to a federal court action:

> The right to hear and refute evidence presented against oneself, the right to present evidence on one's behalf, the right to call witnesses on one's behalf and the right to an impartial tribunal would most likely be the components of an administrative procedure sufficiently adequate to require exhaustion prior to commencing a suit under Section 1983 to vindicate the interference with a constitutional right. *Plano* v. *Baker*, 504 F.2d 595, 598 (2d Cir. 1974), quoting *Hayes* v. *Cape Henlopen School District*, 341 F. Supp. 823, 831 (D. Del. 1972).[10]

Accord Gonzalez v. *Shanker*, 533 F.2d 832 (2d Cir. 1976).

The Stateville procedures only provide a prisoner with an opportunity to appear before the Institutional Inquiry Board and to write an appeal to the Director of Corrections. The prisoner has no right to present evidence or call witnesses. He has no right to be present when witnesses

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[10] If any distinction is to be made between the teachers involved in *Plano* and the prisoners involved in this case, it should recognize the prisoners' greater need for procedural protections. Unlike teachers, who have a bargaining lever due to their ability to work elsewhere, prisoners are powerless. *Cf. Wolff* v. *McDonnell*, 418 U.S. 539, 562 (1974). Similarly, prisoner plaintiffs need greater protection because they are likely to be less educated and do not have the luxury of appearing before their peers. *See Toney* v. *Reagan*, 467 F.2d 953, 958 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

are called. Rather than providing an "adequate" remedy sufficient to justify a temporary closing of the federal courthouse door, these procedures do not even satisfy minimum due process standards. *See Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

An equally glaring inadequacy is that the grievance procedures do not provide for an award of damages, which plaintiff requested in his complaint in the district court. Exhaustion has never been required when the administrative officials are not empowered to grant the relief sought. *Green* v. *Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978); *Ray* v. *Fritz*, 468 F.2d 586, 587 (2d Cir. 1972). Moreover, before §1983 jurisdiction can be relinquished, the court must be "positively assured—it may not presume—that there are speedy, sufficient and readily available administrative remedies. . . ." *Morgan* v. *La Vallee*, 526 F.2d 221, 224 (2d Cir. 1975).

Bias of the decisionmakers is a third inadequacy of the Illinois procedures. While the regulations create an Institutional Inquiry Board and an Administrative Review Board, both in effect are advisory only and the Chief Administrative Officer or the Director of Corrections will make all final decisions. Both the Chief Administrative Officer and the Director of Corrections are hopelessly biased under the precedents of this Court. The Chief Administrative Officer is sued for damages individually and therefore has a direct pecuniary interest, disqualifying him under *Gibson* v. *Berryhill*, 411 U.S. 564, 571, 578-79 (1973). The Director of Corrections wrote the policy forbidding plaintiff from keeping the property that forms the basis of

plaintiff's complaint, and the Director is responsible for the finances of the Department of Corrections. His role in the formation of the policy renders him incompetent because he has prejudged the issues, *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *Fuentes* v. *Roher*, 519 F.2d 379, 387 (2d Cir. 1975), and his fiscal responsibilities create an interest that is more than sufficient to deprive him of impartiality. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

In accepting the Illinois procedures because they theoretically provide some remedy and are not so unfair as to be futile, the Seventh Circuit in *Secret* applied some but not all of the accepted standards for determining the adequacy of administrative remedies.[11] It therefore required exhaustion of state remedies which failed to satisfy three of the most elementary requirements of an adequate procedure: an opportunity to present a case, to obtain the relief desired, and to be judged by an impartial decisionmaker.

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[11] The Illinois procedures also are inadequate because no time limit is provided for either of the two required determinations by the Director of Corrections. In the absence of evidence establishing prompt handling of complaints, this opportunity for delay renders the state remedy inadequate. *See Gibson* v. *Berryhill*, 411 U.S. at 575 n.18; *Green* v. *Ten Eyck*, 572 F.2d 1233, 1240 (8th Cir. 1978) (appeal hearing within a "reasonable time" held inadequate); *Morgan* v. *LaVallee*, 526 F.2d 221 (2d Cir. 1975). Further, only the advisory bodies, the Institutional Inquiry Board and the Administrative Review Board, are required to provide the inmate with their reasons for decision. Because the real decisionmakers are not required to offer their grounds for decision, Illinois' procedures fail to satisfy the requirements of *Wolff* v. *McDonnell*, 418 U.S. at 565. *See Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975).

CONCLUSION

For all of the reasons stated, *amicus* respectfully urges this Court to reverse the decision below holding that exhaustion of administrative remedies is required by prisoners before bringing an action under §1983.

Respectfully submitted,

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No. 80-5116

IN THE

Supreme Court of the United States

October Term 1980

DANE LAMAR JENKINS

Petitioner.

v.

LOU BREWER, WARDEN

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK

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The Recently Passed Civil Rights of Institutionalized Person Act, 42 U.S.C. § 1997 et seq., with Its Carefully Crafted Administrative Exhaustion Requirement, Is Fully Applicable to This Case. Appropriate Deference to Congressional Intent Precludes the Judicial Imposition of a Different or More Burdensome Exhaustion Requirement Such As the One Imposed by the Court Below. 9

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK AS AMICI CURIAE.

The National Prison Project of the American Civil Liberties Union Foundation, Inc. and the Legal Aid Society of the City of New York respectfully move this Court for leave to file a brief *amicus curiae* in this case. We make this motion subsequent to seeking consent from Respondent's attorneys. By letter dated November 25, 1980 such consent was refused.

Identification and Interest of Amici

The National Prison Project is a tax-exempt foundation funded special project of the American Civil Liberties

Union Foundation, Inc. which seeks to enforce and broaden the rights of prisoners to American prisons and jails by utilizing existing administrative, legislative and judicial channels. Established in 1972, the National Prison Project has represented prisoners' interests in federal and state courts and before the Congress and state legislative bodies across the nation. Most recently we appeared before this Court as *amicus* in *Carlson* v. *Green,* 446 U.S. 14 (1980). Since the founding of the Project we have consistently opposed the adoption of a administrative exhaustion requirement in prisoner cases. In connection with this position, we participated in the legislative process which eventually led to the 1980 enactment by Congress of § 7 of the Civil Rights of Institutionalized Persons Act (codified at 42 U.S.C. § 1997e). The safeguards for prisoners contained in this provision are the results of the efforts of prisoner rights advocates and organizations including the Prison Project. Our interest in filing this motion and brief is to make the Court aware of the applicability of this statute in the circumstances of this case.

The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways including prisoners. The Society is greatly concerned with maintaining individuals access to federal courts to remedy violations of their constitutional rights.

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BRIEF OF THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC. AND THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK

Statement of Facts

The Petitioner Dane Lamar Jenkins is a prisoner confined to the Illinois state penitentiary at Joliet (Statesville) to serve his sentence. Pursuant to 42 U.S.C. § 1983 Jenkins *pro se* brought a lawsuit alleging that certain personal property with a monetary value of $851.29 and legal materials were confiscated and not returned by the Statesville prison authorities in violation of his rights under the Due Process clause of the Fourteenth Amendment. The District Court dismissed the action on the grounds that petitioner failed to utilize available ad—

ministrative remedies; exhaustion of such remedies was required under a recent Seventh Circuit decision in *Secret* v. *Brierton,* 584 F.2d 823 (7th Cir. 1978). Before the Court of Appeals affirmed the dismissal of Petitioner's action, Congress enacted the Civil Rights of Institutionalized Persons Act, Pub. L. 96-247 § 7, 94 Stat. 352, 42 U.S.C. § 1997e (Supp. 1980) containing an exhaustion requirement applicable to prisoner cases. Thereafter Petitioner filed his petition for the writ of certiorari. Such writ was granted on November 10, 1980 and counsel appointed on November 17, 1980.

Relevant Statutory Provision

Title 42 U.S.C. § 1997e

Exhaustion of remedies—
Applicability of administrative remedies

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crimen confined in any jail, prision, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards

(b)(1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prision, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

Failure of State to adopt or adhere to administrative grievance procedure

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.
Pub.L.96–247, § 7, May 23, 1980, 94 Stat. 352.

Summary of Argument

After the decision of the District Court, but before the judgment of the Court of Appeals dismissing this civil rights action, Congress enacted a carefully crafted statute setting forth the narrow conditions under which courts were a authorized to require exhaustion in civil rights cases brought by institutionalized persons convicted of crime. Because the question whether exhaustion is required in a § 1983 action is one of legislative intent, and because legislative intent as expressed in the new statute demonstrates that the exhaustion requirement upheld by the Seventh Circuit is inconsistent with the will of Congress, the judgment below must be reversed, and the case remanded to the District Court for proceedings not inconsistent with the statute.

ARGUMENT

THE RECENTLY PASSED CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT, 42 U.S.C. § 1997 et seq., WITH ITS CAREFULLY CRAFTED ADMINISTRATIVE EXHAUSTION REQUIREMENT, IS FULLY APPLICABLE TO THIS CASE. APPROPRIATE DEFERENCE TO CONGRESSIONAL INTENT PRECLUDES THE JUDICIAL IMPOSITION OF A DIFFERENT OR MORE BURDENSOME EXHAUSTION REQUIREMENT SUCH AS THE ONE IMPOSED BY THE COURT BELOW.

A. The Non-Exhaustion Rule and Its Basis

Since 1963, this Court has consistently rejected the notion that state administrative remedies must first be exhausted in order for a plaintiff to invoke the remedy provided by 42 U.S.C. § 1983. *Allen v. McCurry* ____ U.S. ____, U.S.L.W. 4015, 4019, n. 24 (December 9, 1980); *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975) (dictum); *Carter v. Stanton*, 405 U.S. 669 (1972); *Wilwording* v. *Swenson*, 404 U.S. 249, 251 (1971); *Houghton* v. *Shafer*, 392 U.S. 639 (1968); *King* v. *Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico* v. *California*, 389 U.S. 416 (1967); *McNeese* v. *Board of Education*, 373 U.S. 668 (1963).[1] This rule of non-exhaustion has been applied in cases involving prisoners *(Wilwording, Houghton)* as well as in cases in-

[1]The Court of Appeals conceded in promulgating its exhaustion rule that there was no direct support for its holding in this Court's § 1983 exhaustion cases. *Secret* v. *Brierton*, 584 F.2d at 828.

volving welfare recipients *(Carter, Damico)*, students *(McNeese)*, and other civil rights plaintiffs.[2]

In construing 42 U.S.C. § 1983 as not requiring prior administration exhaustion, the Court necessarily relied on the purpose and intent of the statute. Thus, the *McNeese* holding was explicitly based on the Court's prior review of the history and purpose of § 1983. *McNeese*, 373 U.S. at 671-674, relying on *Monroe* v. *Pape*, 365 U.S. 167 (1961). This adherence to the intent of Congress was underscored by the Court in its single qualification of the rule of non-exhaustion. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), the Court held that an action seeking restoration of prisoners' "good time," though appropriately brought under the literal terms of § 1983, must instead be brought under the more specifically applicable habeas corpus statute with its attendant judicial exhaustion requirement. The Court distinguished the *Monroe/McNeese* line of non-exhaustion holdings on the ground that different legislative intentions governed § 1983 and federal habeas corpus.

> . . . [I]n those cases, brought pursuant to § 1983 no other, more specific federal statute was involved that might have reflected a different congressional intent. In the present case, however,the respondents' actions fell squarely within the traditional purpose of federal habeas corpus, and Congress has made the specific

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[2]On the one recent occasion where the Court granted certiorari in a case presenting an opportunity for reconsideration of the non-exhaustion rule, the Court dismissed the writ as improvidently granted, with a suggestion by one Justice that the state of the law was sufficiently clear as to require no opinion by the Court. *Burrell* v. *McCray*, 423 U.S. 471 472-73 (1976). (Stevens, J., concurring).

> determination in § 2254(b) that requiring the exhaustion of adequate state remedies in such cases will serve the policies of federalism. *Preiser*, 411 U.S. at 492 n. 10.[3]

See also *Allen v. McCurry* ____ US ____, 49 U.S.L.W. at 4919 n.24 (cites lack of exhaustion requirement under § 1983 as demonstrating "continuing illogic of treating federal habeas and § 1983 suits as fungible remedies for § 1983 violations").

The Court's understanding of congressional intent reflected in its long string of non-exhaustion holdings was amply supported not only by *stare decisis* but also by the failure of Congress for almost twenty years to disturb these holdings. Compare *Maine v. Thiboutot* ____ U.S. ____, 48 U.S.L.W. 4859, 4861 (June 25, 1980) *Laird* v. *Nelms*, 406 U.S. 797, 802 (1972); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1070). The significance of this failure to act is underscored by Congress' response in an analogous situation to a judicial ruling regarding exhaustion. In light of *Fay* v. *Noia*, 372 U.S. 391 (1963), Congress amended 28 U.S.C. §§ 2254 and 2255 to guide the courts in habeas corpus proceedings. Congress has also explicitly exacted exhaustion of remedies provisions in other areas of the law, e.g., the collection of state taxes (28 U.S.C. § 1341) and state utility rate orders (28 U.S.C. § 1342). In light of these explicit exhaustion requirements, Congress' failure to promulgate a similar requirement under § 1983 is further evidence that no such requirement was intended. See *Carlson* v. *Green*, 446 US 14, 20 (1980).

[3]This passage in *Preiser* apparently escaped the notice of the Seventh Circuit, which, in promulgating its exhaustion requirement, cited the habeas corpus exhaustion requirement as evidence that exhaustion was not inconsistent with the intent of § 1983. *Secret* v. *Brierton*, 584 F.2d at 830-31.

B. The Civil Rights of Institutionalized Persons Act

Congress has now passed legislation specifically establishing and defining a carefully limited exhaustion requirement in § 1983 cases brought by state prisoners. This requirement differs from the Seventh Circuit exhaustion rule in several highly important respects. This new exhaustion provision must be deemed the controlling indication of Congressional intent. The courts may not judicially amend the recent legislation by promulgating additional or different requirements for administrative exhaustion. This conclusion, compelling on its face, is further supported by examination of the legislative history, which shows that the statute's exhaustion requirement developed over time as part of a carefully considered and balanced adjustment of Congress' remedial scheme for the protection of civil rights.

On May 23, 1980, Congress passed the Civil Rights of Institutionalized Persons Act ("the Act"). Pub. L. 96-247, 94 Stat. 349 *et seq.* (codified at 42 U.S.C. §§ 1997-1997j [Supp. 1980]). This statute accomplished two purposes: it established and defined the authority of the Attorney General to commence or to intervene in actions seeking to protect the civil rights of persons held in state institutions (including mental institutions, jails and prisons, juvenile facilities and nursing homes), 42 U.S.C. §§ 1997a-d, f-j, and it established a narrow and limited administrative exhaustion requirement for § 1983 cases brought by adult prisoners. 42 U.S.C. § 1997e.

Earlier bills proposing a broader exhaustion requirement were not enacted. For example, H.R. 12008, 94th Cong. 2d Sess. (1976) provided in part:

> Relief shall not be granted by a district court in an action brought pursuant to Section 1979 of

> the Revised Statutes (42 U.S.C. § 1983) by an individual involuntarily confined in any State institution alleging deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available: *Provided*, That, exhaustion shall not be required if it appears that there exist circumstances rendering such administrative remedy ineffective to protect his rights. *Id.* at §4 (emphasis in original).

The same provisions were included in a virtually identical bill introduced in the same session, H.R. 12230, 94th Cong., 2d Sess. (1976). The exhaustion requirement of these bills applied to all persons involuntarily confined in state institutions. The terms "plain, speedy, and efficient" were not elaborated upon or defined. There was no indication in the bills what circumstances might "render such administrative remedy ineffective" or what "ineffective" meant. The bills appeared to treat exhaustion as a jurisdictional requirement whose absence would justify dismissal of the action.

In the next Congress, these bills were reintroduced as H.R. 5791, 95th Cong., 1st Sess (1977), with identical exhaustion provisions. In the same session, H.R. 2439, was also introduced; it contained provisions similar to those of H.R. 5791 and its predecesors as to the Attorney General's involvement in institutional litigation, but contained no provisions for administrative exhaustion. However, a third bill was introduced in this session, H.R. 9400, 95th Cong., 1st Sess. (1977), which the included the first appearance of an exhaustion requirement in a form similar to that which was ultimately passed. This section of the bill provided:

haustion requirement in a form similar to that which was ultimately passed. This section of the bill provided:

> In any action brought pursuant to section 1979 of the Revised Statutes (42 U.S.C. § 1983) by an adult individual confined in any jail, prision, or other correctional or pretrial detention facility, the court may continue such case for a period not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedy as is available if the court believes that such a requirement would be appropriate and in the interest of justice: *Provided*, that such exhaustion shall not be required unless the Attorney General has certified that such administrative remedy meets the minimum acceptable standards promulgated pursuant to this section. *Id.* at § 5(c) (emphasis in original)

The preceding parts of the quoted section required the Attorney General, "after consultation with State and local agencies and persons and organizations having a background and expertise in the area of corrections," to promulgate minimum standards for grievance resolution systems for jails and prisons, consistent with certain specific requirements in the statute. The Attorney General was also directed to develop a procedure for review and certification of grievance systems to determine if they met these minimum standards. *Id.* at § 5(b, c).

Thus, in H.R. 9400, the focus of the proposed exhaustion requirement had been narrowed to adults confined in prisons, jails and pre-trial detention facilities. Although the terms "plain, speedy, and effective" were not defined in the bill, the exhaustion requirement was limited to cases

in which the Attorney General had promulgated standards meeting certain statutory requirements and had certified the administrative remedy in question as meeting those standards. The prior language that "[r]elief shall not be granted" unless remedies had been exhausted, H.R. 12008 at § 4, was replaced by a provision for a stay of no more than 90 days, giving the plaintiff clear recourse in the event of administrative delay and giving further content to the word "speedy." Finally, application of the exhaustion requirement was made contingent on a finding by the court that it was "appropriate and in the interest of justice," giving the courts leeway to deal with the facts of particular cases (e.g., a dispute over medical treatment of an arguably emergency nature).

In 1979, substantially similar legislation was introduced as H.R. 10, 96th Cong., 1st Sess. (1979). Several minor modifications were made in the exhaustion provisions. The language of H.R. 10 permitted exhaustion to be required if the "Attorney General has certified *or the court has determined* that such administrative remedy is in substantial compliance, with the minimum acceptable standards promulgated pursuant to this section." H.R. 10 at § 4 (c) (emphasis added). The Attorney General was given a deadline of 180 days after the passage of the bill to promulgate minimum standards; these standards were to be submitted for publication in the Federal Register and were to take effect after publication unless either House of Congress adopted a resolution of disapproval. *Id.* at § 4(a).

H.R. 10 was ultimately passed and signed into law on May 23, 1980, after some further amendment and after referral to a conference committee to resolve differences between the House and Senate versions of the legislation.

H.R. Report 96-897, 96th Cong., 2d Sess. at 1.[4] The exhaustion provisions of the bill as enacted were substantially identical to those initially proposed in H.R. 10 except for some minor changes in wording, the elimination of pre-trial detainees from the exhaustion requirement, and a statement that a state's failure to adopt a grievance procedure consistent with the above described provisions would not constitute a basis for a separate lawsuit.

Review of this series of legislative proposals and the statute that ultimately emerged reveals Congress' attempt to strike a balance among the needs of prisoners for protection of their constitutional rights, the needs of courts for relief from the management problems caused by prision litigation (primarily *pro se* petitions by uncounselled inmates), and the desirability of having disputes resolved "in-house" without resort to litigation. The salient features of the balance finally struck are as follows.

1. An exhaustion requirement for prisoner suits was linked with establishment of fair and effective grievance mechanisms. If prision authorities seek the benefits of the Act's exhaustion requirement, they must provide remedies whose exhaustion provides some prospect of a fair resolution of the controversy, as determined by the Attorney

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[4]In the Senate, several bills were introduced authorizing the Attorney General's involvement in institutional litigation but containing no exhaustion requirement. S.1393, 95th Cong., 1st Sess. (1977); S.10, 96th Cong., 1st Sess. (1979); see S.Rep. 96-416, 96th Cong., 1st Sess. (1979) at 9. An exhaustion requirement substantially identical to the provision ultimately enacted was added to S.10 before that bill was reported favorably by the Committee on the Judiciary. S.10, 96th Cong., 1st Sess., S.Rep. 96-416 (1979) at 34.

General or by the court.[5] The seriousness with which Congress views this linkage is indicated by the Conference Report's structure that "It is the intent of Congress that the phrase 'in substantial compliance with' means that there be no omission of any essential part from compliance, that any omission from compliance consists only of unimportant defects or omissions, and that there has been a firm effort to fully comply with the standards." H.R. Report 96-897 at 17.

2. Specific requirements for the minimum standards are to be promulgated by the Attorney General. The standards must provide:

> (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible) in the formulation, implementation and operation of the system.
>
> (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
>
> (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
>
> (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

[5]The provision permitting the court to find that a grievance procedure substantially complies with the Attorney General's minimum standards is intended for cases where the Attorney General's certification has not been sought or is pending, and not to permit the courts to overrule the Attorney General's determination. H.R. Report 96-897 at 17.

> (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution. 42 U.S.C. § 1997e(b)(2)[6]

These requirements are explicitly derived from the California Youth Authority grievance procedure, a system which has been in operation since 1973 and which has a national reputation for success in resolving disputes. H.R. Rep. 96-80, 96th Cong., 1st Sess. (1979) at 23; see also William Bennett Turner, "When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts", 92 Harv. L. Rev. 610, 642 (1979). Congress has thus adopted a "working model" of a fair and effective grievance procedure, and conformity to these tested principles is intended to be a prerequisite for application of the Act's exhaustion requirement.

3. The exhaustion requirement is discretionary, not mandatory or jurisdictional; in order to apply it,

> . . . the court must find that it would be "appropriate and in the interests of justice."
>
> It is the intent of Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to 42 U.S.C. § 1983 raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system. . . . H.R. Rep. 96-897 at 15 (Conference Report).

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[6]The Attorney General has, pursuant to the statute promulgated proposed minimum standards. Department of Justice, Office of the Attorney General, "Standards for Inmate Grievance Procedures," 45 F.R. 79095 (November 28, 1980).

This requirement that the court affirmatively find exhaustion "appropriate and in the interests of justice" represents a significant shift in the burden of persuasion from the provision of H.R. 12008 that "exhaustion shall not be required if it appears that there exist circumstances rendering such administrative remedy ineffective to protect (plaintiff's) rights." Such a shift is especially appropriate because many prisoner litigants must proceed *pro se* and are not sophisticated enough to make an adequate showing of futility or ineffectiveness. Turnes, *supra,* at 643.

4. The statute provides for a continuance not to exceed 90 days to permit administrative remedies to be exhausted, rather than providing for dismissal for failure to exhaust. This provision constitutes a powerful safeguard against purposeful or negligent delay in administrative proceedings and confirms the court's continuing responsibility even where it has determined that administrative exhaustion should be required. This stay provision is also more realistic and fair to indigent *pro se* prisoners with limited sophistication and resources than a rule requiring dismissal without prejudice and subsequent refiling. Even under the relaxed scrutiny given to prisoners' *pro se* petitions and under the liberal provisions for *in forma pauperis* proceedings in the federal courts, *Hughes v. Rowe,* ____ U.S. ____, 49 U.S.L.W. 3346 (November 20, 1980); *Haines* v. *Kerner,* 404 U.S. 519 (1972), many prisoners have great practical and/or economic difficulty in preparing and mailing acceptable legal papers, and particularly in submitting a sufficient number of legible copies. Thus a requirement of refiling the action after resort to the administrative process is unduly and unnecessarily burdensome to prisoner-plaintiffs. See *Turner, supra,* at 642-43 and 646.

C. **Conflicts Between the Act and the Seventh Circuit Role**

In construing § 1983 and related statutes the Court must give effect to the purposes of Congress.[7] *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979); *Allen* v. *McCurry* _____ *US* _____, 49 U.S.L.W. 4015. When Congress amends a statutory scheme, as it has done in the Civil Rights of Institutionalized Persons Act, it must be assumed that it does so with care, and that what is says is what it means. *Palmore* v. *United States,* 411 U.S. 489, 395 (1973). And in the construction of any statute, the Court must be guided by the ancient maxim *expressio unisus est exclusio alterius,* see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 543, 458 (1974), and its more contemporary rendering, that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States,* 278 U.S. 282, 289 (1929).

Accordingly, the carefully tailored exhaustion requirement of the Act must prevail over judicially created alternatives. Because the Seventh Circuit's exhaustion requirement differs in important respects from the Act (and more closely resembles earlier rejected versions of the statute) it cannot stand. These important differences between the Act and the *Secret* requirements are as follows:

1. There is no requirement in *Secret* that the exhaustion requirement be limited to grievance procedures which conform to the Attorney General's minimum standards. This

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[7]The Seventh Circuit acknowledged as much in promulgating its exhaustion requirement: "The present matter being one of judicial construction of legislative intent, we are not persuaded that the result we here reach does violence to that intent." *Secret* v. *Brierton,* 584 F.2d at 831. The Court reached that conclusion however, before passage of *the new administrative exhaustion requirement in* § 1997e.

linkage is essential to the newly created Congressional scheme, and a judicial rule that departs must be rejected.

2. *Secret* requires dismissal without prejudice for failure to exhaust remedies, rather than a stay pending exhaustion.

3. The Act provides an overall 90-day time limit during which an action may be stayed for administrative exhaustion, and minimum standards to be promulgated by the Attorney General are required to provide "specific maximum time limits for written replies. . . at each decision level. . . ." By contrast, *Secret* requires only that procedures be "capable of providing [the] remedy within a reasonable time. . . ." 584 F.2d at 831. The absence of a specific and unambiguous time limit invites both dilatory conduct on the part of prison officials and pointless collateral litigation over what is "reasonable." The administrative scheme approved in *Secret* contains a rigorous time limit for the initial in-house stages but provides no time limit for the appeal to the Director of Corrections, for the Director's reference to the Administrative Review Board, or for the Board's response to the Director. 584 F.2d 832. Moreover, *Secret* is keyed to what the procedures are "capable of providing", not to what they actually provide, so a petitioner whose administrative claim is unduly delayed has no guidance as to the point at which he or she can stop waiting for Godot and file (or refile) suit under § 1983. By contrast, the Act's 90-day stay provision sets an unambiguous limit on administrative delay, after which the action is automatically restored to the district court's active docket.

4. The minimum standards to be promulgated by the Attorney General must provide "an advisory role for employees and inmates. . . in the formulation, implementation, and operation of the system. . . ." *Secret* has no

such requirement, and the Illinois procedure provide no role for inmates.

5. Under the Act, the minimum standards must provide "written replies with reasons thereto at each decision level." There is no such requirement in *Secret*, and the procedures approved in *Secret*, while requiring written findings at the facility level, do not require that the inmate be informed of anything but the result. If the prisoner appeals, the Director may find the grievance to be without merit without stating any reasons; if the Director refers the matter to an Administrative Review Board, the Board is to file findings and recommendations with the Director, but the inmate is not required to be given any reasons for the Director's final determination.

In summary, the Seventh Circuit's exhaustion requirement is inconsistent in significant respects with the requirement set forth in the Civil Rights of Institutionalized Persons Act. Since the imposition of an exhaustion requirement on a statutory remedy is an act of statutory construction, and since Congress has now spoken authoritatively as to its views on exhaustion under § 1983, any contrary judicial construction is void. Accordingly, the dismissal of the petitioner's complaint must be reversed.

D. Disposition of Petitioner's Claim

Because the Civil Rights of Institutionalized Persons Act does not authorize the courts to require administrative exhaustion on the present facts, Mr. Jenkins' claim should be remanded to the district court for a determination of the merits.

It is axiomatic that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or

legislative history to the contrary." *Bradley* v. *School Board of Richmond,* 416 U.S. 696, 711 (1974); *accord, Cort* v. *Ash,* 422 U.S. 66, 76-77 (1975); *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 164-65 (1975); *Fusari* v. *Steinberg,* 419 U.S. 379, 387 (1975) and cases cited. ". . . [E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley,* 416 U.S. at 715. As previously noted, there is no "statutory direction or legislative history to the contrary" here. Certainly, there can be no "manifest injustice" in proceeding to judgment without administrative exhaustion, under circumstances where Congress would not require exhaustion. This is not a change in the substantive law affecting vested rights and presents none of the equitable and constitutional problems associated with such situations. *Compare Denver and Rio Grande Western Railroad Co.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 563 (1967) (amended venue statute applied); *United States* v. *Alabama,* 362 U.S. 602, 604 (1960) (amended jurisdictional statute applied); *with Greene* v. *United States,* 375 U.S. 149 (1964) (amended regulation restricting monetary restitution for wrongful loss of earnings not applied where claim accrued before amendment). "No one has a vested right in any given mode of procedure," *Crane* v. *Hahlo,* 238 U.S. 142, 147 (1922), especially where the "mode of procedure"—administrative exhaustion under the *Secret* holding—is a judicial gloss on a statute, unauthorized by the legislature and concededly unsupported by this Court's prior decisions.[8] Whether one

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[8]As noted previously, the only reference to legislative intent in *Secret* v. *Brierton* is in connection with the exhaustion requirement of habeas corpus, which this Court distinguished in *Preiser* v. *Rodriguez,* 411 U.S. at 492 n.10. The *Secret* cour explicitly conceded the lack of support for its holding in the prior decisions of this Court. 584 F.2d at 828.

chooses to view the Act in this context as a governing statute to be applied directly or as one of several pieces of evidence that an administrative exhaustion requirement was not previously intended,[9] the results is the same: administrative exhaustion may be required only on the terms prescribed by the Act, terms which are not met by the District Court's action.

Although the Act was passed a few days before the argument in the Court of Appeals, it is not mentioned in that Court's opinion and it appears that neither the court nor the parties were aware of it. However, there is no need to remand to the Court of Appeals for a determination of the Act's relevance. Its effect is clear. The plain requirements of the Act have not been met by the District Court's disposition of this case, and the Illinois procedure approved by the Seventh Circuit in *Secret* v. *Brierton* is also in conflict with the plain requirements of the Act. Since there is no possible construction of the Act that would require, or permit the District Court to require, further resort to the Illinois administrative scheme, there is nothing for the Court of Appeals to decide[10] and the case should be remanded to the District Court for decision on the merits. See *Denver and Rio Grande Western Railroad Co.*, 387 U.S. at 563; *United States* v. *Alabama*, 362 U.S. at 604.

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[9]See *NLRB* v. *Sears Roebuck & Co.*, 421 U.S. at 164-65 (legislative history of amended statute evidenced disapproval of prior case law).

[10]For the same reason, the Court need not reach the petitioner's argument that further administrative exhaustion would be futile in this case.

CONCLUSION

For the reasons set forth above, the judgments below should be reversed and the cause remanded to the District Court for a determination of the merits.

Respectfully submitted,

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